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## Title 28 – Judicial Administration Chapter I – Department of Justice

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# **PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES**

**Authority:** 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134, 12131, and 12205a.

**Source:** Order No. 1512-91, 56 FR 35716, July 26, 1991, unless otherwise noted.

## **Subpart A—General**

### **§ 35.101 Purpose and broad coverage.**

- (a) **Purpose.** The purpose of this part is to implement subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131-12134), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Pub. L. 110-325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by public entities.
- (b) **Broad coverage.** The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of “disability” in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of “disability.” The question of whether an individual meets the definition of “disability” under this part should not demand extensive analysis.

[AG Order 3702-2016, 81 FR 53223, Aug. 11, 2016]

## § 35.102 Application.

- (a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.
- (b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA (42 U.S.C. 12141), they are not subject to the requirements of this part.

## § 35.103 Relationship to other laws.

- (a) **Rule of interpretation.** Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title.
- (b) **Other laws.** This part does not invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

## § 35.104 Definitions.

For purposes of this part, the term—

**1991 Standards** means the requirements set forth in the ADA Standards for Accessible Design, originally published on July 26, 1991, and republished as Appendix D to 28 CFR part 36.

**2004 ADAAG** means the requirements set forth in appendices B and D to 36 CFR part 1191 (2009).

**2010 Standards** means the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in § 35.151.

**Act** means the Americans with Disabilities Act (Pub. L. 101-336, 104 Stat. 327, 42 U.S.C. 12101-12213 and 47 U.S.C. 225 and 611).

**Archived web content** means web content that—

- (1) Was created before the date the public entity is required to comply with subpart H of this part, reproduces paper documents created before the date the public entity is required to comply with subpart H, or reproduces the contents of other physical media created before the date the public entity is required to comply with subpart H;
- (2) Is retained exclusively for reference, research, or recordkeeping;
- (3) Is not altered or updated after the date of archiving; and
- (4) Is organized and stored in a dedicated area or areas clearly identified as being archived.

**Assistant Attorney General** means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

**Auxiliary aids and services** includes—

- (1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text

telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

- (2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;
- (3) Acquisition or modification of equipment or devices; and
- (4) Other similar services and actions.

**Complete complaint** means a written statement that contains the complainant's name and address and describes the public entity's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of this part. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

**Conventional electronic documents** means web content or content in mobile apps that is in the following electronic file formats: portable document formats ("PDF"), word processor file formats, presentation file formats, and spreadsheet file formats.

**Current illegal use of drugs** means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

**Designated agency** means the Federal agency designated under subpart G of this part to oversee compliance activities under this part for particular components of State and local governments.

**Direct threat** means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139.

**Disability.** The definition of *disability* can be found at § 35.108.

**Drug** means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

**Existing facility** means a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part.

**Facility** means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

**Historic preservation programs** means programs conducted by a public entity that have preservation of historic properties as a primary purpose.

**Historic Properties** means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under State or local law.

**Housing at a place of education** means housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence.

**Illegal use of drugs** means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term *illegal use of drugs* does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

**Individual with a disability** means a person who has a disability. The term *individual with a disability* does not include an individual who is currently engaging in the illegal use of drugs, when the public entity acts on the basis of such use.

**Medical diagnostic equipment ("MDE")** means equipment used in, or in conjunction with, medical settings by health care providers for diagnostic purposes. MDE includes, for example, examination tables, examination chairs (including chairs used for eye examinations or procedures and dental examinations or procedures), weight scales, mammography equipment, x-ray machines, and other radiological equipment commonly used for diagnostic purposes by health professionals.

**Mobile applications ("apps")** means software applications that are downloaded and designed to run on mobile devices, such as smartphones and tablets.

**Other power-driven mobility device** means any mobility device powered by batteries, fuel, or other engines—whether or not designed primarily for use by individuals with mobility disabilities—that is used by individuals with mobility disabilities for the purpose of locomotion, including golf cars, electronic personal assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair within the meaning of this section. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

**Public entity** means—

- (1) Any State or local government;
- (2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
- (3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

**Qualified individual with a disability** means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

**Qualified interpreter** means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

**Qualified reader** means a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary.

**Section 504** means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended.

**Service animal** means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

**Special district government** means a public entity—other than a county, municipality, township, or independent school district—authorized by State law to provide one function or a limited number of designated functions with sufficient administrative and fiscal autonomy to qualify as a separate government and whose population is not calculated by the United States Census Bureau in the most recent decennial Census or Small Area Income and Poverty Estimates.

**Standards for Accessible Medical Diagnostic Equipment ("Standards for Accessible MDE")** means the standards promulgated by the Architectural and Transportation Barriers Compliance Board under section 510 of the Rehabilitation Act of 1973, as amended, found at 36 CFR part 1195 (revised as of July 1, 2017), with the exception of M301.2.2 and M302.2.2.

**State** means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

**Total population** means—

- (1) If a public entity has a population calculated by the United States Census Bureau in the most recent decennial Census, the population estimate for that public entity as calculated by the United States Census Bureau in the most recent decennial Census; or
- (2) If a public entity is an independent school district, or an instrumentality of an independent school district, the population estimate for the independent school district as calculated by the United States Census Bureau in the most recent Small Area Income and Poverty Estimates; or
- (3) If a public entity, other than a special district government or an independent school district, does not have a population estimate calculated by the United States Census Bureau in the most recent decennial Census, but is an instrumentality or a commuter authority of one or more State or local governments that do have such a population estimate, the combined decennial Census population estimates for any State or local governments of which the public entity is an instrumentality or commuter authority; or
- (4) For the National Railroad Passenger Corporation, the population estimate for the United States as calculated by the United States Census Bureau in the most recent decennial Census.

**User agent** means any software that retrieves and presents web content for users.

**Video remote interpreting (VRI) service** means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images as provided in § 35.160(d).

**WCAG 2.1** means the Web Content Accessibility Guidelines ("WCAG") 2.1, W3C Recommendation 05 June 2018, <https://www.w3.org/TR/2018/REC-WCAG21-20180605/> and <https://perma.cc/UB8A-GG2F>. WCAG 2.1 is incorporated by reference elsewhere in this part (see §§ 35.200 and 35.202).

**Web content** means the information and sensory experience to be communicated to the user by means of a user agent, including code or markup that defines the content's structure, presentation, and interactions. Examples of web content include text, images, sounds, videos, controls, animations, and conventional electronic documents.

**Wheelchair** means a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and outdoor locomotion. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

[Order No. 1512-91, 56 FR 35716, July 26, 1991, as amended by AG Order No. 3180-2010, 75 FR 56177, Sept. 15, 2010; 76 FR 13285, Mar. 11, 2011; AG Order 3702-2016, 81 FR 53223, Aug. 11, 2016; AG Order No. 5919-2024, 89 FR 31336, Apr. 24, 2024; AG Order No. 5982-2024, 89 FR 65187, Aug. 9, 2024]

## § 35.105 Self-evaluation.

- (a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.
- (b) A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the self-evaluation process by submitting comments.
- (c) A public entity that employs 50 or more persons shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:
  - (1) A list of the interested persons consulted;
  - (2) A description of areas examined and any problems identified; and
  - (3) A description of any modifications made.
- (d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

(Approved by the Office of Management and Budget under control number 1190-0006)

[56 FR 35716, July 26, 1991, as amended by Order No. 1694-93, 58 FR 17521, Apr. 5, 1993]

## § 35.106 Notice.

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

## § 35.107 Designation of responsible employee and adoption of grievance procedures.

- (a) **Designation of responsible employee.** A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.
- (b) **Complaint procedure.** A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

## § 35.108 Definition of “disability.”

- (a)
  - (1) **Disability** means, with respect to an individual:
    - (i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
    - (ii) A record of such an impairment; or
    - (iii) Being regarded as having such an impairment as described in paragraph (f) of this section.
  - (2) **Rules of construction.**
    - (i) The definition of “disability” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.
    - (ii) An individual may establish coverage under any one or more of the three prongs of the definition of “disability” in paragraph (a)(1) of this section, the “actual disability” prong in paragraph (a)(1)(i) of this section, the “record of” prong in paragraph (a)(1)(ii) of this section, or the “regarded as” prong in paragraph (a)(1)(iii) of this section.
    - (iii) Where an individual is not challenging a public entity’s failure to provide reasonable modifications under § 35.130(b)(7), it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the “regarded as” prong of the definition of “disability,” which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the “actual disability” or “record of” prong regardless of whether the individual is challenging a public entity’s failure to provide reasonable modifications.

- (b)

(1) ***Physical or mental impairment*** means:

- (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
  - (ii) Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.
- (2) ***Physical or mental impairment*** includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: orthopedic, visual, speech, and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.
- (3) ***Physical or mental impairment*** does not include homosexuality or bisexuality.

(c)

(1) ***Major life activities*** include, but are not limited to:

- (i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working; and
- (ii) The operation of a *major bodily function*, such as the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) ***Rules of construction.***

- (i) In determining whether an impairment substantially limits a major life activity, the term *major* shall not be interpreted strictly to create a demanding standard.
- (ii) Whether an activity is a *major life activity* is not determined by reference to whether it is of central importance to daily life.

(d) ***Substantially limits –***(1) ***Rules of construction.*** The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity.

- (i) The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.
- (ii) The primary object of attention in cases brought under title II of the ADA should be whether public entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

- (iii) An impairment that substantially limits one major life activity does not need to limit other major life activities in order to be considered a substantially limiting impairment.
- (iv) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- (v) An impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.
- (vi) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADA Amendments Act.
- (vii) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph (d)(1) is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate.
- (viii) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.
- (ix) The six-month "transitory" part of the "transitory and minor" exception in paragraph (f)(2) of this section does not apply to the "actual disability" or "record of" prongs of the definition of "disability." The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability.

(2) **Predictable assessments.**

- (i) The principles set forth in the rules of construction in this section are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA.
- (ii) Applying these principles, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraph (a)(1)(i) of this section (the "actual disability" prong) or paragraph (a)(1)(ii) of this section (the "record of" prong). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

- (iii) For example, applying these principles it should easily be concluded that the types of impairments set forth in paragraphs (d)(2)(iii)(A) through (K) of this section will, at a minimum, substantially limit the major life activities indicated. The types of impairments described in this paragraph may substantially limit additional major life activities (including major bodily functions) not explicitly listed in paragraphs (d)(2)(iii)(A) through (K).
- (A) Deafness substantially limits hearing;
  - (B) Blindness substantially limits seeing;
  - (C) Intellectual disability substantially limits brain function;
  - (D) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;
  - (E) Autism substantially limits brain function;
  - (F) Cancer substantially limits normal cell growth;
  - (G) Cerebral palsy substantially limits brain function;
  - (H) Diabetes substantially limits endocrine function;
  - (I) Epilepsy, muscular dystrophy, and multiple sclerosis each substantially limits neurological function;
  - (J) Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and
  - (K) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function.

(3) *Condition, manner, or duration.*

- (i) At all times taking into account the principles set forth in the rules of construction, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.
- (ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.
- (iii) In determining whether an individual has a disability under the "actual disability" or "record of" prongs of the definition of "disability," the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be

substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

- (iv) Given the rules of construction set forth in this section, it may often be unnecessary to conduct an analysis involving most or all of the facts related to condition, manner, or duration. This is particularly true with respect to impairments such as those described in paragraph (d)(2)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(4) **Mitigating measures** include, but are not limited to:

- (i) Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;
- (ii) Use of assistive technology;
- (iii) Reasonable modifications or auxiliary aids or services as defined in this regulation;
- (iv) Learned behavioral or adaptive neurological modifications; or
- (v) Psychotherapy, behavioral therapy, or physical therapy.

(e) **Has a record of such an impairment.**

- (1) An individual has a record of such an impairment if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
- (2) **Broad construction.** Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of "disability" if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (d)(1) of this section apply.
- (3) **Reasonable modification.** An individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.

(f) **Is regarded as having such an impairment.** The following principles apply under the "regarded" as prong of the definition of "disability" (paragraph (a)(1)(iii) of this section):

- (1) Except as set forth in paragraph (f)(2) of this section, an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, even if the public entity asserts, or may or does ultimately establish, a defense to the action prohibited by the ADA.

- (2) An individual is not "regarded as having such an impairment" if the public entity demonstrates that the impairment is, objectively, both "transitory" and "minor." A public entity may not defeat "regarded as" coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the public entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment), objectively, both "transitory" and "minor." For purposes of this section, "transitory" is defined as lasting or expected to last six months or less.
- (3) Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established under title II of the ADA only when an individual proves that a public entity discriminated on the basis of disability within the meaning of title II of the ADA, 42 U.S.C. 12131-12134.
- (g) **Exclusions.** The term "disability" does not include—
- (1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
  - (2) Compulsive gambling, kleptomania, or pyromania; or
  - (3) Psychoactive substance use disorders resulting from current illegal use of drugs.

[AG Order 3702-2016, 81 FR 53223, Aug. 11, 2016]

## §§ 35.109-35.129 [Reserved]

## Subpart B—General Requirements

### § 35.130 General prohibitions against discrimination.

- (a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.
- (b)
  - (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—
    - (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
    - (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
    - (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
    - (iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

- (v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;
  - (vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;
  - (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.
- (2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.
- (3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:
- (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;
  - (ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or
  - (iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.
- (4) A public entity may not, in determining the site or location of a facility, make selections—
- (i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or
  - (ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.
- (5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.
- (6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.
- (7)
- (i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.
  - (ii) A public entity is not required to provide a reasonable modification to an individual who meets the definition of "disability" solely under the "regarded as" prong of the definition of "disability" at § 35.108(a)(1)(iii).

- (8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.
- (c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.
- (d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.
- (e)
  - (1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.
  - (2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.
- (f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.
- (g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.
- (h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.
  - (i) Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted a reasonable modification that was denied to an individual without a disability.

[Order No. 1512-91, 56 FR 35716, July 26, 1991, as amended by AG Order No. 3180-2010, 75 FR 56178, Sept. 15, 2010; AG Order 3702-2016, 81 FR 53225, Aug. 11, 2016]

## § 35.131 Illegal use of drugs.

### (a) General.

- (1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.
- (2) A public entity shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who—
  - (i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

- (ii) Is participating in a supervised rehabilitation program; or
- (iii) Is erroneously regarded as engaging in such use.

**(b) *Health and drug rehabilitation services.***

- (1) A public entity shall not deny health services, or services provided in connection with drug rehabilitation, to an individual on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.
- (2) A drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.

**(c) *Drug testing.***

- (1) This part does not prohibit a public entity from adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.
- (2) Nothing in paragraph (c) of this section shall be construed to encourage, prohibit, restrict, or authorize the conduct of testing for the illegal use of drugs.

**§ 35.132 Smoking.**

This part does not preclude the prohibition of, or the imposition of restrictions on, smoking in transportation covered by this part.

**§ 35.133 Maintenance of accessible features.**

- (a) A public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part.
- (b) This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.
- (c) If the 2010 Standards reduce the technical requirements or the number of required accessible elements below the number required by the 1991 Standards, the technical requirements or the number of accessible elements in a facility subject to this part may be reduced in accordance with the requirements of the 2010 Standards.

[56 FR 35716, July 26, 1991, as amended by Order No. 1694-93, 58 FR 17521, Apr. 5, 1993; AG Order No. 3180-2010, 75 FR 56178, Sept. 15, 2010]

**§ 35.134 Retaliation or coercion.**

- (a) No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.
- (b) No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part.

## § 35.135 Personal devices and services.

This part does not require a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting, or dressing.

## § 35.136 Service animals.

- (a) **General.** Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.
- (b) **Exceptions.** A public entity may ask an individual with a disability to remove a service animal from the premises if—
  - (1) The animal is out of control and the animal's handler does not take effective action to control it; or
  - (2) The animal is not housebroken.
- (c) **If an animal is properly excluded.** If a public entity properly excludes a service animal under § 35.136(b), it shall give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises.
- (d) **Animal under handler's control.** A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means).
- (e) **Care or supervision.** A public entity is not responsible for the care or supervision of a service animal.
- (f) **Inquiries.** A public entity shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public entity may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).
- (g) **Access to areas of a public entity.** Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.
- (h) **Surcharges.** A public entity shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.
- (i) **Miniature horses.**

- (1) **Reasonable modifications.** A public entity shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.
- (2) **Assessment factors.** In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public entity shall consider—
  - (i) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;
  - (ii) Whether the handler has sufficient control of the miniature horse;
  - (iii) Whether the miniature horse is housebroken; and
  - (iv) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.
- (3) **Other requirements.** Paragraphs 35.136(c) through (h) of this section, which apply to service animals, shall also apply to miniature horses.

[AG Order No. 3180-2010, 75 FR 56178, Sept. 15, 2010; 76 FR 13285, Mar. 11, 2011]

## § 35.137 Mobility devices.

- (a) **Use of wheelchairs and manually-powered mobility aids.** A public entity shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities, in any areas open to pedestrian use.
- (b)
  - (1) **Use of other power-driven mobility devices.** A public entity shall make reasonable modifications in its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless the public entity can demonstrate that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements that the public entity has adopted pursuant to § 35.130(h).
  - (2) **Assessment factors.** In determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under paragraph (b)(1) of this section, a public entity shall consider—
    - (i) The type, size, weight, dimensions, and speed of the device;
    - (ii) The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);
    - (iii) The facility's design and operational characteristics (e.g., whether its service, program, or activity is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user);
    - (iv) Whether legitimate safety requirements can be established to permit the safe operation of the other power-driven mobility device in the specific facility; and

- (v) Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws and regulations.

(c)

- (1) **Inquiry about disability.** A public entity shall not ask an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual's disability.
- (2) **Inquiry into use of other power-driven mobility device.** A public entity may ask a person using an other power-driven mobility device to provide a credible assurance that the mobility device is required because of the person's disability. A public entity that permits the use of an other power-driven mobility device by an individual with a mobility disability shall accept the presentation of a valid, State-issued, disability parking placard or card, or other State-issued proof of disability as a credible assurance that the use of the other power-driven mobility device is for the individual's mobility disability. In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a public entity shall accept as a credible assurance a verbal representation, not contradicted by observable fact, that the other power-driven mobility device is being used for a mobility disability. A "valid" disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance's requirements for disability placards or cards.

[AG Order No. 3180-2010, 75 FR 56178, Sept. 15, 2010]

## § 35.138 Ticketing.

(a)

- (1) For the purposes of this section, "accessible seating" is defined as wheelchair spaces and companion seats that comply with sections 221 and 802 of the 2010 Standards along with any other seats required to be offered for sale to the individual with a disability pursuant to paragraph (d) of this section.
- (2) **Ticket sales.** A public entity that sells tickets for a single event or series of events shall modify its policies, practices, or procedures to ensure that individuals with disabilities have an equal opportunity to purchase tickets for accessible seating—
  - (i) During the same hours;
  - (ii) During the same stages of ticket sales, including, but not limited to, pre-sales, promotions, lotteries, wait-lists, and general sales;
  - (iii) Through the same methods of distribution;
  - (iv) In the same types and numbers of ticketing sales outlets, including telephone service, in-person ticket sales at the facility, or third-party ticketing services, as other patrons; and
  - (v) Under the same terms and conditions as other tickets sold for the same event or series of events.

- (b) **Identification of available accessible seating.** A public entity that sells or distributes tickets for a single event or series of events shall, upon inquiry—

- (1) Inform individuals with disabilities, their companions, and third parties purchasing tickets for accessible seating on behalf of individuals with disabilities of the locations of all unsold or otherwise available accessible seating for any ticketed event or events at the facility;
  - (2) Identify and describe the features of available accessible seating in enough detail to reasonably permit an individual with a disability to assess independently whether a given accessible seating location meets his or her accessibility needs; and
  - (3) Provide materials, such as seating maps, plans, brochures, pricing charts, or other information, that identify accessible seating and information relevant thereto with the same text or visual representations as other seats, if such materials are provided to the general public.
- (c) **Ticket prices.** The price of tickets for accessible seating for a single event or series of events shall not be set higher than the price for other tickets in the same seating section for the same event or series of events. Tickets for accessible seating must be made available at all price levels for every event or series of events. If tickets for accessible seating at a particular price level are not available because of inaccessible features, then the percentage of tickets for accessible seating that should have been available at that price level (determined by the ratio of the total number of tickets at that price level to the total number of tickets in the assembly area) shall be offered for purchase, at that price level, in a nearby or similar accessible location.
- (d) **Purchasing multiple tickets.**
- (1) **General.** For each ticket for a wheelchair space purchased by an individual with a disability or a third-party purchasing such a ticket at his or her request, a public entity shall make available for purchase three additional tickets for seats in the same row that are contiguous with the wheelchair space, provided that at the time of purchase there are three such seats available. A public entity is not required to provide more than three contiguous seats for each wheelchair space. Such seats may include wheelchair spaces.
  - (2) **Insufficient additional contiguous seats available.** If patrons are allowed to purchase at least four tickets, and there are fewer than three such additional contiguous seat tickets available for purchase, a public entity shall offer the next highest number of such seat tickets available for purchase and shall make up the difference by offering tickets for sale for seats that are as close as possible to the accessible seats.
  - (3) **Sales limited to less than four tickets.** If a public entity limits sales of tickets to fewer than four seats per patron, then the public entity is only obligated to offer as many seats to patrons with disabilities, including the ticket for the wheelchair space, as it would offer to patrons without disabilities.
  - (4) **Maximum number of tickets patrons may purchase exceeds four.** If patrons are allowed to purchase more than four tickets, a public entity shall allow patrons with disabilities to purchase up to the same number of tickets, including the ticket for the wheelchair space.
  - (5) **Group sales.** If a group includes one or more individuals who need to use accessible seating because of a mobility disability or because their disability requires the use of the accessible features that are provided in accessible seating, the group shall be placed in a seating area with accessible seating so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from their group.
- (e) **Hold-and-release of tickets for accessible seating.**

- (1) **Tickets for accessible seating may be released for sale in certain limited circumstances.** A public entity may release unsold tickets for accessible seating for sale to individuals without disabilities for their own use for a single event or series of events only under the following circumstances—
- (i) When all non-accessible tickets (excluding luxury boxes, club boxes, or suites) have been sold;
  - (ii) When all non-accessible tickets in a designated seating area have been sold and the tickets for accessible seating are being released in the same designated area; or
  - (iii) When all non-accessible tickets in a designated price category have been sold and the tickets for accessible seating are being released within the same designated price category.
- (2) **No requirement to release accessible tickets.** Nothing in this paragraph requires a facility to release tickets for accessible seating to individuals without disabilities for their own use.
- (3) **Release of series-of-events tickets on a series-of-events basis.**
- (i) **Series-of-events tickets sell-out when no ownership rights are attached.** When series-of-events tickets are sold out and a public entity releases and sells accessible seating to individuals without disabilities for a series of events, the public entity shall establish a process that prevents the automatic reassignment of the accessible seating to such ticket holders for future seasons, future years, or future series so that individuals with disabilities who require the features of accessible seating and who become newly eligible to purchase tickets when these series-of-events tickets are available for purchase have an opportunity to do so.
  - (ii) **Series-of-events tickets when ownership rights are attached.** When series-of-events tickets with an ownership right in accessible seating areas are forfeited or otherwise returned to a public entity, the public entity shall make reasonable modifications in its policies, practices, or procedures to afford individuals with mobility disabilities or individuals with disabilities that require the features of accessible seating an opportunity to purchase such tickets in accessible seating areas.
- (f) **Ticket transfer.** Individuals with disabilities who hold tickets for accessible seating shall be permitted to transfer tickets to third parties under the same terms and conditions and to the same extent as other spectators holding the same type of tickets, whether they are for a single event or series of events.
- (g) **Secondary ticket market.**
- (1) A public entity shall modify its policies, practices, or procedures to ensure that an individual with a disability may use a ticket acquired in the secondary ticket market under the same terms and conditions as other individuals who hold a ticket acquired in the secondary ticket market for the same event or series of events.
  - (2) If an individual with a disability acquires a ticket or series of tickets to an inaccessible seat through the secondary market, a public entity shall make reasonable modifications to its policies, practices, or procedures to allow the individual to exchange his ticket for one to an accessible seat in a comparable location if accessible seating is vacant at the time the individual presents the ticket to the public entity.
- (h) **Prevention of fraud in purchase of tickets for accessible seating.** A public entity may not require proof of disability, including, for example, a doctor's note, before selling tickets for accessible seating.

- (1) **Single-event tickets.** For the sale of single-event tickets, it is permissible to inquire whether the individual purchasing the tickets for accessible seating has a mobility disability or a disability that requires the use of the accessible features that are provided in accessible seating, or is purchasing the tickets for an individual who has a mobility disability or a disability that requires the use of the accessible features that are provided in the accessible seating.
- (2) **Series-of-events tickets.** For series-of-events tickets, it is permissible to ask the individual purchasing the tickets for accessible seating to attest in writing that the accessible seating is for a person who has a mobility disability or a disability that requires the use of the accessible features that are provided in the accessible seating.
- (3) **Investigation of fraud.** A public entity may investigate the potential misuse of accessible seating where there is good cause to believe that such seating has been purchased fraudulently.

[AG Order No. 3180-2010, 75 FR 56179, Sept. 15, 2010]

## § 35.139 Direct threat.

- (a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.
- (b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

[AG Order No. 3180-2010, 75 FR 56180, Sept. 15, 2010]

## Subpart C—Employment

### § 35.140 Employment discrimination prohibited.

- (a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.
- (b)
  - (1) For purposes of this part, the requirements of title I of the Act, as established by the regulations of the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I.
  - (2) For the purposes of this part, the requirements of section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 CFR part 41, as those requirements pertain to employment, apply to employment in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of title I.

## §§ 35.141-35.148 [Reserved]

## Subpart D—Program Accessibility

## § 35.149 Discrimination prohibited.

Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

## § 35.150 Existing facilities.

(a) **General.** A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—

- (1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;
- (2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or
- (3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) **Methods —**

- (1) **General.** A public entity may comply with the requirements of this section through such means as redesign or acquisition of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

- (2)

- (i) **Safe harbor.** Elements that have not been altered in existing facilities on or after March 15, 2012 and that comply with the corresponding technical and scoping specifications for those elements in either the 1991 Standards or in the Uniform Federal Accessibility Standards (UFAS), Appendix A to 41 CFR part 101-19.6 (July 1, 2002 ed.), 49 FR 31528, app. A (Aug. 7, 1984) are not required to be modified in order to comply with the requirements set forth in the 2010 Standards.
    - (ii) The safe harbor provided in § 35.150(b)(2)(i) does not apply to those elements in existing facilities that are subject to supplemental requirements (i.e., elements for which there are neither technical nor scoping specifications in the 1991 Standards). Elements in the 2010 Standards not eligible for the element-by-element safe harbor are identified as follows—
      - (A) **Residential facilities dwelling units**, sections 233 and 809.
      - (B) **Amusement rides**, sections 234 and 1002; 206.2.9; 216.12.
      - (C) **Recreational boating facilities**, sections 235 and 1003; 206.2.10.
      - (D) **Exercise machines and equipment**, sections 236 and 1004; 206.2.13.
      - (E) **Fishing piers and platforms**, sections 237 and 1005; 206.2.14.
      - (F) **Golf facilities**, sections 238 and 1006; 206.2.15.
      - (G) **Miniature golf facilities**, sections 239 and 1007; 206.2.16.
      - (H) **Play areas**, sections 240 and 1008; 206.2.17.
      - (I) **Saunas and steam rooms**, sections 241 and 612.
      - (J) **Swimming pools, wading pools, and spas**, sections 242 and 1009.
      - (K) **Shooting facilities with firing positions**, sections 243 and 1010.
      - (L) **Miscellaneous.**
        - (1) Team or player seating, section 221.2.1.4.
        - (2) Accessible route to bowling lanes, section 206.2.11.
        - (3) Accessible route in court sports facilities, section 206.2.12.
- (3) **Historic preservation programs.** In meeting the requirements of § 35.150(a) in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of paragraph (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include—
  - (i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;
  - (ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or
  - (iii) Adopting other innovative methods.

(4) ***Swimming pools, wading pools, and spas.*** The requirements set forth in sections 242 and 1009 of the 2010 Standards shall not apply until January 31, 2013, if a public entity chooses to make structural changes to existing swimming pools, wading pools, or spas built before March 15, 2012, for the sole purpose of complying with the program accessibility requirements set forth in this section.

(c) ***Time period for compliance.*** Where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

(d) ***Transition plan.***

(1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum—

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied with the transition plan requirement of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall apply only to those policies and practices that were not included in the previous transition plan.

(Approved by the Office of Management and Budget under control number 1190-0004)

[56 FR 35716, July 26, 1991, as amended by Order No. 1694-93, 58 FR 17521, Apr. 5, 1993; AG Order No. 3180-2010, 75 FR 56180, Sept. 15, 2010; AG Order 3332-2012, 77 FR 30179, May 21, 2012]

## § 35.151 New construction and alterations.

(a) ***Design and construction.***

(1) Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(2) **Exception for structural impracticability.**

(i) Full compliance with the requirements of this section is not required where a public entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.

(ii) If full compliance with this section would be structurally impracticable, compliance with this section is required to the extent that it is not structurally impracticable. In that case, any portion of the facility that can be made accessible shall be made accessible to the extent that it is not structurally impracticable.

(iii) If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would be structurally impracticable, accessibility shall nonetheless be ensured to persons with other types of disabilities, (e.g., those who use crutches or who have sight, hearing, or mental impairments) in accordance with this section.

(b) **Alterations.**

(1) Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(2) The path of travel requirements of § 35.151(b)(4) shall apply only to alterations undertaken solely for purposes other than to meet the program accessibility requirements of § 35.150.

(3)

(i) Alterations to historic properties shall comply, to the maximum extent feasible, with the provisions applicable to historic properties in the design standards specified in § 35.151(c).

(ii) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of § 35.150.

(4) **Path of travel.** An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost of the overall alteration.

(i) **Primary function.** A “primary function” is a major activity for which the facility is intended. Areas that contain a primary function include, but are not limited to, the dining area of a cafeteria, the meeting rooms in a conference center, as well as offices and other work areas in which the activities of the public entity using the facility are carried out.

- (A) Mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, and corridors are not areas containing a primary function. Restrooms are not areas containing a primary function unless the provision of restrooms is a primary purpose of the area, e.g., in highway rest stops.
  - (B) For the purposes of this section, alterations to windows, hardware, controls, electrical outlets, and signage shall not be deemed to be alterations that affect the usability of or access to an area containing a primary function.
- (ii) A “path of travel” includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility.
- (A) An accessible path of travel may consist of walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of these elements.
  - (B) For the purposes of this section, the term “path of travel” also includes the restrooms, telephones, and drinking fountains serving the altered area.
  - (C) **Safe harbor.** If a public entity has constructed or altered required elements of a path of travel in accordance with the specifications in either the 1991 Standards or the Uniform Federal Accessibility Standards before March 15, 2012, the public entity is not required to retrofit such elements to reflect incremental changes in the 2010 Standards solely because of an alteration to a primary function area served by that path of travel.
- (iii) ***Disproportionality.***
- (A) Alterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds 20% of the cost of the alteration to the primary function area.
  - (B) Costs that may be counted as expenditures required to provide an accessible path of travel may include:
    - (1) Costs associated with providing an accessible entrance and an accessible route to the altered area, for example, the cost of widening doorways or installing ramps;
    - (2) Costs associated with making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes, or installing accessible faucet controls;
    - (3) Costs associated with providing accessible telephones, such as relocating the telephone to an accessible height, installing amplification devices, or installing a text telephone (TTY); and
    - (4) Costs associated with relocating an inaccessible drinking fountain.
- (iv) ***Duty to provide accessible features in the event of disproportionality.***

(A) When the cost of alterations necessary to make the path of travel to the altered area fully accessible is disproportionate to the cost of the overall alteration, the path of travel shall be made accessible to the extent that it can be made accessible without incurring disproportionate costs.

(B) In choosing which accessible elements to provide, priority should be given to those elements that will provide the greatest access, in the following order—

(1) An accessible entrance;

(2) An accessible route to the altered area;

(3) At least one accessible restroom for each sex or a single unisex restroom;

(4) Accessible telephones;

(5) Accessible drinking fountains; and

(6) When possible, additional accessible elements such as parking, storage, and alarms.

(v) ***Series of smaller alterations.***

(A) The obligation to provide an accessible path of travel may not be evaded by performing a series of small alterations to the area served by a single path of travel if those alterations could have been performed as a single undertaking.

(B)

(1) If an area containing a primary function has been altered without providing an accessible path of travel to that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alterations to the primary function areas on that path of travel during the preceding three year period shall be considered in determining whether the cost of making that path of travel accessible is disproportionate.

(2) Only alterations undertaken on or after March 15, 2011 shall be considered in determining if the cost of providing an accessible path of travel is disproportionate to the overall cost of the alterations.

(c) ***Accessibility standards and compliance date.***

(1) If physical construction or alterations commence after July 26, 1992, but prior to September 15, 2010, then new construction and alterations subject to this section must comply with either UFAS or the 1991 Standards except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of the 1991 Standards shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(2) If physical construction or alterations commence on or after September 15, 2010 and before March 15, 2012, then new construction and alterations subject to this section may comply with one of the following: The 2010 Standards, UFAS, or the 1991 Standards except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of the 1991 Standards shall not apply.

Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

- (3) If physical construction or alterations commence on or after March 15, 2012, then new construction and alterations subject to this section shall comply with the 2010 Standards.
- (4) For the purposes of this section, ceremonial groundbreaking or razing of structures prior to site preparation do not commence physical construction or alterations.
- (5) ***Noncomplying new construction and alterations.***
  - (i) Newly constructed or altered facilities or elements covered by §§ 35.151(a) or (b) that were constructed or altered before March 15, 2012, and that do not comply with the 1991 Standards or with UFAS shall before March 15, 2012, be made accessible in accordance with either the 1991 Standards, UFAS, or the 2010 Standards.
  - (ii) Newly constructed or altered facilities or elements covered by §§ 35.151(a) or (b) that were constructed or altered before March 15, 2012 and that do not comply with the 1991 Standards or with UFAS shall, on or after March 15, 2012, be made accessible in accordance with the 2010 Standards.

## APPENDIX TO § 35.151(c)

Compliance dates for new construction and alterations	Applicable standards
Before September 15, 2010	1991 Standards or UFAS.
On or after September 15, 2010 and before March 15, 2012	1991 Standards, UFAS, or 2010 Standards.
On or after March 15, 2012	2010 Standards.

- (d) ***Scope of coverage.*** The 1991 Standards and the 2010 Standards apply to fixed or built-in elements of buildings, structures, site improvements, and pedestrian routes or vehicular ways located on a site. Unless specifically stated otherwise, the advisory notes, appendix notes, and figures contained in the 1991 Standards and the 2010 Standards explain or illustrate the requirements of the rule; they do not establish enforceable requirements.
- (e) ***Social service center establishments.*** Group homes, halfway houses, shelters, or similar social service center establishments that provide either temporary sleeping accommodations or residential dwelling units that are subject to this section shall comply with the provisions of the 2010 Standards applicable to residential facilities, including, but not limited to, the provisions in sections 233 and 809.
  - (1) In sleeping rooms with more than 25 beds covered by this section, a minimum of 5% of the beds shall have clear floor space complying with section 806.2.3 of the 2010 Standards.
  - (2) Facilities with more than 50 beds covered by this section that provide common use bathing facilities shall provide at least one roll-in shower with a seat that complies with the relevant provisions of section 608 of the 2010 Standards. Transfer-type showers are not permitted in lieu of a roll-in

shower with a seat, and the exceptions in sections 608.3 and 608.4 for residential dwelling units are not permitted. When separate shower facilities are provided for men and for women, at least one roll-in shower shall be provided for each group.

- (f) **Housing at a place of education.** Housing at a place of education that is subject to this section shall comply with the provisions of the 2010 Standards applicable to transient lodging, including, but not limited to, the requirements for transient lodging guest rooms in sections 224 and 806 subject to the following exceptions. For the purposes of the application of this section, the term "sleeping room" is intended to be used interchangeably with the term "guest room" as it is used in the transient lodging standards.
- (1) Kitchens within housing units containing accessible sleeping rooms with mobility features (including suites and clustered sleeping rooms) or on floors containing accessible sleeping rooms with mobility features shall provide turning spaces that comply with section 809.2.2 of the 2010 Standards and kitchen work surfaces that comply with section 804.3 of the 2010 Standards.
  - (2) Multi-bedroom housing units containing accessible sleeping rooms with mobility features shall have an accessible route throughout the unit in accordance with section 809.2 of the 2010 Standards.
  - (3) Apartments or townhouse facilities that are provided by or on behalf of a place of education, which are leased on a year-round basis exclusively to graduate students or faculty, and do not contain any public use or common use areas available for educational programming, are not subject to the transient lodging standards and shall comply with the requirements for residential facilities in sections 233 and 809 of the 2010 Standards.
- (g) **Assembly areas.** Assembly areas subject to this section shall comply with the provisions of the 2010 Standards applicable to assembly areas, including, but not limited to, sections 221 and 802. In addition, assembly areas shall ensure that—
- (1) In stadiums, arenas, and grandstands, wheelchair spaces and companion seats are dispersed to all levels that include seating served by an accessible route;
  - (2) Assembly areas that are required to horizontally disperse wheelchair spaces and companion seats by section 221.2.3.1 of the 2010 Standards and have seating encircling, in whole or in part, a field of play or performance area shall disperse wheelchair spaces and companion seats around that field of play or performance area;
  - (3) Wheelchair spaces and companion seats are not located on (or obstructed by) temporary platforms or other movable structures, except that when an entire seating section is placed on temporary platforms or other movable structures in an area where fixed seating is not provided, in order to increase seating for an event, wheelchair spaces and companion seats may be placed in that section. When wheelchair spaces and companion seats are not required to accommodate persons eligible for those spaces and seats, individual, removable seats may be placed in those spaces and seats;
  - (4) Stadium-style movie theaters shall locate wheelchair spaces and companion seats on a riser or cross-aisle in the stadium section that satisfies at least one of the following criteria—
    - (i) It is located within the rear 60% of the seats provided in an auditorium; or

- (ii) It is located within the area of an auditorium in which the vertical viewing angles (as measured to the top of the screen) are from the 40th to the 100th percentile of vertical viewing angles for all seats as ranked from the seats in the first row (1st percentile) to seats in the back row (100th percentile).

(h) **Medical care facilities.** Medical care facilities that are subject to this section shall comply with the provisions of the 2010 Standards applicable to medical care facilities, including, but not limited to, sections 223 and 805. In addition, medical care facilities that do not specialize in the treatment of conditions that affect mobility shall disperse the accessible patient bedrooms required by section 223.2.1 of the 2010 Standards in a manner that is proportionate by type of medical specialty.

(i) **Curb ramps.**

- (1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.
- (2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

(j) **Facilities with residential dwelling units for sale to individual owners.**

- (1) Residential dwelling units designed and constructed or altered by public entities that will be offered for sale to individuals shall comply with the requirements for residential facilities in the 2010 Standards, including sections 233 and 809.
- (2) The requirements of paragraph (1) also apply to housing programs that are operated by public entities where design and construction of particular residential dwelling units take place only after a specific buyer has been identified. In such programs, the covered entity must provide the units that comply with the requirements for accessible features to those pre-identified buyers with disabilities who have requested such a unit.

(k) **Detention and correctional facilities.**

- (1) New construction of jails, prisons, and other detention and correctional facilities shall comply with the 2010 Standards except that public entities shall provide accessible mobility features complying with section 807.2 of the 2010 Standards for a minimum of 3%, but no fewer than one, of the total number of cells in a facility. Cells with mobility features shall be provided in each classification level.
- (2) **Alterations to detention and correctional facilities.** Alterations to jails, prisons, and other detention and correctional facilities shall comply with the 2010 Standards except that public entities shall provide accessible mobility features complying with section 807.2 of the 2010 Standards for a minimum of 3%, but no fewer than one, of the total number of cells being altered until at least 3%, but no fewer than one, of the total number of cells in a facility shall provide mobility features complying with section 807.2. Altered cells with mobility features shall be provided in each classification level. However, when alterations are made to specific cells, detention and correctional facility operators may satisfy their obligation to provide the required number of cells with mobility features by providing the required mobility features in substitute cells (cells other than those where alterations are originally planned), provided that each substitute cell—

- (i) Is located within the same prison site;
- (ii) Is integrated with other cells to the maximum extent feasible;

- (iii) Has, at a minimum, equal physical access as the altered cells to areas used by inmates or detainees for visitation, dining, recreation, educational programs, medical services, work programs, religious services, and participation in other programs that the facility offers to inmates or detainees; and
  - (iv) If it is technically infeasible to locate a substitute cell within the same prison site, a substitute cell must be provided at another prison site within the corrections system.
- (3) With respect to medical and long-term care facilities in jails, prisons, and other detention and correctional facilities, public entities shall apply the 2010 Standards technical and scoping requirements for those facilities irrespective of whether those facilities are licensed.

[56 FR 35716, July 26, 1991, as amended by Order No. 1694-93, 58 FR 17521, Apr. 5, 1993; AG Order No. 3180-2010, 75 FR 56180, Sept. 15, 2010; 76 FR 13285, Mar. 11, 2011]

## **§ 35.152 Jails, detention and correctional facilities, and community correctional facilities.**

- (a) **General.** This section applies to public entities that are responsible for the operation or management of adult and juvenile justice jails, detention and correctional facilities, and community correctional facilities, either directly or through contractual, licensing, or other arrangements with public or private entities, in whole or in part, including private correctional facilities.
- (b) **Discrimination prohibited.**
  - (1) Public entities shall ensure that qualified inmates or detainees with disabilities shall not, because a facility is inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.
  - (2) Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. Unless it is appropriate to make an exception, a public entity—
    - (i) Shall not place inmates or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are available;
    - (ii) Shall not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;
    - (iii) Shall not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would otherwise be housed; and
    - (iv) Shall not deprive inmates or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed.
  - (3) Public entities shall implement reasonable policies, including physical modifications to additional cells in accordance with the 2010 Standards, so as to ensure that each inmate with a disability is housed in a cell with the accessible elements necessary to afford the inmate access to safe, appropriate housing.

[AG Order No. 3180-2010, 75 FR 56183, Sept. 15, 2010]

## **§§ 35.152-35.159 [Reserved]**

## Subpart E—Communications

### § 35.160 General.

(a)

- (1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.
- (2) For purposes of this section, “companion” means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate.

(b)

- (1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.
- (2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

(c)

- (1) A public entity shall not require an individual with a disability to bring another individual to interpret for him or her.
- (2) A public entity shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except—
  - (i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or
  - (ii) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.
- (3) A public entity shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

(d) **Video remote interpreting (VRI) services.** A public entity that chooses to provide qualified interpreters via VRI services shall ensure that it provides—

- (1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

- (2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;
- (3) A clear, audible transmission of voices; and
- (4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

[Order No. 1512-91, 56 FR 35716, July 26, 1991, as amended by AG Order No. 3180-2010, 75 FR 56183, Sept. 15, 2010]

## § 35.161 Telecommunications.

- (a) Where a public entity communicates by telephone with applicants and beneficiaries, text telephones (TTYs) or equally effective telecommunications systems shall be used to communicate with individuals who are deaf or hard of hearing or have speech impairments.
- (b) When a public entity uses an automated-attendant system, including, but not limited to, voicemail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems.
- (c) A public entity shall respond to telephone calls from a telecommunications relay service established under title IV of the ADA in the same manner that it responds to other telephone calls.

[AG Order No. 3180-2010, 75 FR 56184, Sept. 15, 2010]

## § 35.162 Telephone emergency services.

Telephone emergency services, including 911 services, shall provide direct access to individuals who use TDD's and computer modems.

## § 35.163 Information and signage.

- (a) A public entity shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.
- (b) A public entity shall provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each accessible entrance of a facility.

## § 35.164 Duties.

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that

conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

## §§ 35.165-35.169 [Reserved]

## Subpart F—Compliance Procedures

### § 35.170 Complaints.

- (a) ***Who may file.*** An individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part.
- (b) ***Time for filing.*** A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the designated agency for good cause shown. A complaint is deemed to be filed under this section on the date it is first filed with any Federal agency.
- (c) ***Where to file.*** An individual may file a complaint with any agency that he or she believes to be the appropriate agency designated under subpart G of this part, or with any agency that provides funding to the public entity that is the subject of the complaint, or with the Department of Justice for referral as provided in § 35.171(a)(2).

### § 35.171 Acceptance of complaints.

- (a) ***Receipt of complaints.***
  - (1)
    - (i) Any Federal agency that receives a complaint of discrimination on the basis of disability by a public entity shall promptly review the complaint to determine whether it has jurisdiction over the complaint under section 504.
    - (ii) If the agency does not have section 504 jurisdiction, it shall promptly determine whether it is the designated agency under subpart G of this part responsible for complaints filed against that public entity.
  - (2)
    - (i) If an agency other than the Department of Justice determines that it does not have section 504 jurisdiction and is not the designated agency, it shall promptly refer the complaint to the appropriate designated agency, the agency that has section 504 jurisdiction, or the Department of Justice, and so notify the complainant.
    - (ii) When the Department of Justice receives a complaint for which it does not have jurisdiction under section 504 and is not the designated agency, it may exercise jurisdiction pursuant to § 35.190(e) or refer the complaint to an agency that does have jurisdiction under section 504 or to the appropriate agency designated in subpart G of this part or, in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission.
  - (3)

- (i) If the agency that receives a complaint has section 504 jurisdiction, it shall process the complaint according to its procedures for enforcing section 504.
- (ii) If the agency that receives a complaint does not have section 504 jurisdiction, but is the designated agency, it shall process the complaint according to the procedures established by this subpart.

**(b) Employment complaints.**

- (1) If a complaint alleges employment discrimination subject to title I of the Act, and the agency has section 504 jurisdiction, the agency shall follow the procedures issued by the Department of Justice and the Equal Employment Opportunity Commission under section 107(b) of the Act.
- (2) If a complaint alleges employment discrimination subject to title I of the Act, and the designated agency does not have section 504 jurisdiction, the agency shall refer the complaint to the Equal Employment Opportunity Commission for processing under title I of the Act.
- (3) Complaints alleging employment discrimination subject to this part, but not to title I of the Act shall be processed in accordance with the procedures established by this subpart.

**(c) Complete complaints.**

- (1) A designated agency shall accept all complete complaints under this section and shall promptly notify the complainant and the public entity of the receipt and acceptance of the complaint.
- (2) If the designated agency receives a complaint that is not complete, it shall notify the complainant and specify the additional information that is needed to make the complaint a complete complaint. If the complainant fails to complete the complaint, the designated agency shall close the complaint without prejudice.

[Order No. 1512-91, 56 FR 35716, July 26, 1991, as amended by AG Order No. 3180-2010, 75 FR 56184, Sept. 15, 2010]

## § 35.172 Investigations and compliance reviews.

- (a) The designated agency shall investigate complaints for which it is responsible under § 35.171.
- (b) The designated agency may conduct compliance reviews of public entities in order to ascertain whether there has been a failure to comply with the nondiscrimination requirements of this part.
- (c) Where appropriate, the designated agency shall attempt informal resolution of any matter being investigated under this section, and, if resolution is not achieved and a violation is found, issue to the public entity and the complainant, if any, a Letter of Findings that shall include—
  - (1) Findings of fact and conclusions of law;
  - (2) A description of a remedy for each violation found (including compensatory damages where appropriate); and
  - (3) Notice of the rights and procedures available under paragraph (d) of this section and §§ 35.173 and 35.174.
- (d) At any time, the complainant may file a private suit pursuant to section 203 of the Act, 42 U.S.C. 12133, whether or not the designated agency finds a violation.

[AG Order No. 3180-2010, 75 FR 56184, Sept. 15, 2010]

## § 35.173 Voluntary compliance agreements.

- (a) When the designated agency issues a noncompliance Letter of Findings, the designated agency shall—
  - (1) Notify the Assistant Attorney General by forwarding a copy of the Letter of Findings to the Assistant Attorney General; and
  - (2) Initiate negotiations with the public entity to secure compliance by voluntary means.
- (b) Where the designated agency is able to secure voluntary compliance, the voluntary compliance agreement shall—
  - (1) Be in writing and signed by the parties;
  - (2) Address each cited violation;
  - (3) Specify the corrective or remedial action to be taken, within a stated period of time, to come into compliance;
  - (4) Provide assurance that discrimination will not recur; and
  - (5) Provide for enforcement by the Attorney General.

## § 35.174 Referral.

If the public entity declines to enter into voluntary compliance negotiations or if negotiations are unsuccessful, the designated agency shall refer the matter to the Attorney General with a recommendation for appropriate action.

## § 35.175 Attorney's fees.

In any action or administrative proceeding commenced pursuant to the Act or this part, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

## § 35.176 Alternative means of dispute resolution.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Act and this part.

## § 35.177 Effect of unavailability of technical assistance.

A public entity shall not be excused from compliance with the requirements of this part because of any failure to receive technical assistance, including any failure in the development or dissemination of any technical assistance manual authorized by the Act.

## § 35.178 State immunity.

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

## §§ 35.179-35.189 [Reserved]

### Subpart G—Designated Agencies

#### § 35.190 Designated agencies.

- (a) The Assistant Attorney General shall coordinate the compliance activities of Federal agencies with respect to State and local government components, and shall provide policy guidance and interpretations to designated agencies to ensure the consistent and effective implementation of the requirements of this part.
- (b) The Federal agencies listed in paragraph (b) (1) through (8) of this section shall have responsibility for the implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas.
  - (1) **Department of Agriculture:** All programs, services, and regulatory activities relating to farming and the raising of livestock, including extension services.
  - (2) **Department of Education:** All programs, services, and regulatory activities relating to the operation of elementary and secondary education systems and institutions, institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools), and libraries.
  - (3) **Department of Health and Human Services:** All programs, services, and regulatory activities relating to the provision of health care and social services, including schools of medicine, dentistry, nursing, and other health-related schools, the operation of health care and social service providers and institutions, including “grass-roots” and community services organizations and programs, and preschool and daycare programs.
  - (4) **Department of Housing and Urban Development:** All programs, services, and regulatory activities relating to state and local public housing, and housing assistance and referral.
  - (5) **Department of Interior:** All programs, services, and regulatory activities relating to lands and natural resources, including parks and recreation, water and waste management, environmental protection, energy, historic and cultural preservation, and museums.
  - (6) **Department of Justice:** All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless assigned to other designated agencies); state and local government support services (e.g., audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies.
  - (7) **Department of Labor:** All programs, services, and regulatory activities relating to labor and the work force.
  - (8) **Department of Transportation:** All programs, services, and regulatory activities relating to transportation, including highways, public transportation, traffic management (non-law enforcement), automobile licensing and inspection, and driver licensing.

- (c) Responsibility for the implementation of subpart F of this part for components of State or local governments that exercise responsibilities, regulate, or administer services, programs, or activities relating to functions not assigned to specific designated agencies by paragraph (b) of this section may be assigned to other specific agencies by the Department of Justice.
- (d) If two or more agencies have apparent responsibility over a complaint, the Assistant Attorney General shall determine which one of the agencies shall be the designated agency for purposes of that complaint.
- (e) When the Department receives a complaint directed to the Attorney General alleging a violation of this part that may fall within the jurisdiction of a designated agency or another Federal agency that may have jurisdiction under section 504, the Department may exercise its discretion to retain the complaint for investigation under this part.

[Order No. 1512-91, 56 FR 35716, July 26, 1991, as amended by AG Order No. 3180-2010, 75 FR 56184, Sept. 15, 2010]

## §§ 35.191-35.199 [Reserved]

### Subpart H—Web and Mobile Accessibility

**Source:** AG Order No. 5919-2024, 89 FR 31337, Apr. 24, 2024, unless otherwise noted.

## § 35.200 Requirements for web and mobile accessibility.

- (a) **General.** A public entity shall ensure that the following are readily accessible to and usable by individuals with disabilities:
  - (1) Web content that a public entity provides or makes available, directly or through contractual, licensing, or other arrangements; and
  - (2) Mobile apps that a public entity provides or makes available, directly or through contractual, licensing, or other arrangements.
- (b) **Requirements.**
  - (1) Beginning April 24, 2026, a public entity, other than a special district government, with a total population of 50,000 or more shall ensure that the web content and mobile apps that the public entity provides or makes available, directly or through contractual, licensing, or other arrangements, comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1, unless the public entity can demonstrate that compliance with this section would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.
  - (2) Beginning April 26, 2027, a public entity with a total population of less than 50,000 or any public entity that is a special district government shall ensure that the web content and mobile apps that the public entity provides or makes available, directly or through contractual, licensing, or other arrangements, comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1, unless the public entity can demonstrate that compliance with this section would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

- (3) WCAG 2.1 is incorporated by reference into this section with the approval of the Director of the FEDERAL REGISTER under 5 U.S.C. 552(a) and 1 CFR part 51. All material approved for incorporation by reference is available for inspection at the U.S. Department of Justice and at the National Archives and Records Administration ("NARA"). Contact the U.S. Department of Justice at: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 150 M St. NE, 9th Floor, Washington, DC 20002; ADA Information Line: (800) 514-0301 (voice) or 1-833-610-1264 (TTY); website: [www.ada.gov](http://www.ada.gov) [<https://perma.cc/U2V5-78KW>]. For information on the availability of this material at NARA, visit [www.archives.gov/federal-register/cfr/ibr-locations.html](http://www.archives.gov/federal-register/cfr/ibr-locations.html) [<https://perma.cc/9SJ7-D7XZ>] or email [fr.inspection@nara.gov](mailto:fr.inspection@nara.gov). The material may be obtained from the World Wide Web Consortium ("W3C") Web Accessibility Initiative ("WAI"), 401 Edgewater Place, Suite 600, Wakefield, MA 01880; phone: (339) 273-2711; email: [contact@w3.org](mailto:contact@w3.org); website: <https://www.w3.org/TR/2018/REC-WCAG21-20180605/> and <https://perma.cc/UB8A-GG2F>.

## § 35.201 Exceptions.

The requirements of § 35.200 do not apply to the following:

- (a) **Archived web content.** Archived web content as defined in § 35.104.
- (b) **Preexisting conventional electronic documents.** Conventional electronic documents that are available as part of a public entity's web content or mobile apps before the date the public entity is required to comply with this subpart, unless such documents are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities.
- (c) **Content posted by a third party.** Content posted by a third party, unless the third party is posting due to contractual, licensing, or other arrangements with the public entity.
- (d) **Individualized, password-protected or otherwise secured conventional electronic documents.** Conventional electronic documents that are:
  - (1) About a specific individual, their property, or their account; and
  - (2) Password-protected or otherwise secured.
- (e) **Preexisting social media posts.** A public entity's social media posts that were posted before the date the public entity is required to comply with this subpart.

## § 35.202 Conforming alternate versions.

- (a) A public entity may use conforming alternate versions of web content, as defined by WCAG 2.1, to comply with § 35.200 only where it is not possible to make web content directly accessible due to technical or legal limitations.
- (b) WCAG 2.1 is incorporated by reference into this section with the approval of the Director of the FEDERAL REGISTER under 5 U.S.C. 552(a) and 1 CFR part 51. All material approved for incorporation by reference is available for inspection at the U.S. Department of Justice and at NARA. Contact the U.S. Department of Justice at: Disability Rights Section, Civil Rights Division, U.S. Department of Justice, 150 M St. NE, 9th Floor, Washington, DC 20002; ADA Information Line: (800) 514-0301 (voice) or 1-833-610-1264 (TTY); website: [www.ada.gov](http://www.ada.gov) [<https://perma.cc/U2V5-78KW>]. For information on the availability of this material at NARA, visit [www.archives.gov/federal-register/cfr/ibr-locations.html](http://www.archives.gov/federal-register/cfr/ibr-locations.html) [<https://perma.cc/9SJ7-D7XZ>] or email [fr.inspection@nara.gov](mailto:fr.inspection@nara.gov). The material may be obtained from W3C WAI, 401 Edgewater Place, Suite 600, Wakefield, MA 01880; phone: (339) 273-2711; email: [contact@w3.org](mailto:contact@w3.org); website: <https://www.w3.org/TR/2018/REC-WCAG21-20180605/> and <https://perma.cc/UB8A-GG2F>.

## § 35.203 Equivalent facilitation.

Nothing in this subpart prevents the use of designs, methods, or techniques as alternatives to those prescribed, provided that the alternative designs, methods, or techniques result in substantially equivalent or greater accessibility and usability of the web content or mobile app.

## § 35.204 Duties.

Where a public entity can demonstrate that compliance with the requirements of § 35.200 would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, compliance with § 35.200 is required to the extent that it does not result in a fundamental alteration or undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.200 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or their designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity to the maximum extent possible.

## § 35.205 Effect of noncompliance that has a minimal impact on access.

A public entity that is not in full compliance with the requirements of § 35.200(b) will be deemed to have met the requirements of § 35.200 in the limited circumstance in which the public entity can demonstrate that the noncompliance has such a minimal impact on access that it would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app to do any of the following in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use:

- (a) Access the same information as individuals without disabilities;
- (b) Engage in the same interactions as individuals without disabilities;
- (c) Conduct the same transactions as individuals without disabilities; and
- (d) Otherwise participate in or benefit from the same services, programs, and activities as individuals without disabilities.

## §§ 35.206-35.209 [Reserved]

## Subpart I—Accessible Medical Diagnostic Equipment

Source: AG Order No. 5982-2024, 89 FR 65187, Aug. 9, 2024, unless otherwise noted.

## § 35.210 Requirements for medical diagnostic equipment.

No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the health care services, programs, or activities of a public entity offered through or with the use of medical diagnostic equipment ("MDE"), or otherwise be subjected to discrimination by any public entity because the public entity's MDE is not readily accessible to or usable by persons with disabilities.

## § 35.211 Newly purchased, leased, or otherwise acquired medical diagnostic equipment.

- (a) **Requirements for all newly purchased, leased, or otherwise acquired medical diagnostic equipment.** All MDE that public entities purchase, lease (including via lease renewals), or otherwise acquire after October 8, 2024, shall, subject to the requirements and limitations set forth in this section, meet the Standards for Accessible MDE, unless and until the public entity satisfies the scoping requirements set forth in paragraph (b) of this section.

(b) **Scoping requirements –**

- (1) **General requirement for medical diagnostic equipment.** Where a service, program, or activity of a public entity, including physicians' offices, clinics, emergency rooms, hospitals, outpatient facilities, and multi-use facilities, utilizes MDE, at least 10 percent of the total number of units, but no fewer than one unit, of each type of equipment in use must meet the Standards for Accessible MDE.

- (2) **Facilities that specialize in treating conditions that affect mobility.** In rehabilitation facilities that specialize in treating conditions that affect mobility, outpatient physical therapy facilities, and other services, programs, or activities that specialize in treating conditions that affect mobility, at least 20 percent, but no fewer than one unit, of each type of equipment in use must meet the Standards for Accessible MDE.

- (3) **Facilities with multiple departments.** In any facility or program with multiple departments, clinics, or specialties, where a service, program, or activity uses MDE, the facility shall disperse the accessible MDE required by paragraphs (b)(1) and (2) of this section in a manner that is proportionate by department, clinic, or specialty using MDE.

- (c) **Requirements for examination tables and weight scales.** Within two years after August 9, 2024, public entities shall, subject to the requirements and limitations set forth in this section, purchase, lease, or otherwise acquire the following, unless the entity already has them in place:

- (1) At least one examination table that meets the Standards for Accessible MDE, if the public entity uses at least one examination table; and
- (2) At least one weight scale that meets the Standards for Accessible MDE, if the public entity uses at least one weight scale.

- (d) **Equivalent facilitation.** Nothing in this section prevents the use of designs, products, or technologies as alternatives to those prescribed by the Standards for Accessible MDE, provided they result in substantially equivalent or greater accessibility and usability of the health care service, program, or activity. The responsibility for demonstrating equivalent facilitation rests with the public entity.

- (e) **Fundamental alteration and undue burdens.** This section does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that

compliance with paragraph (a) or (c) of this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or their designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

- (f) ***Diagnostically required structural or operational characteristics.*** A public entity meets its burden of proving that compliance with paragraph (a) or (c) of this section would result in a fundamental alteration under paragraph (e) of this section if it demonstrates that compliance with paragraph (a) or (c) of this section would alter diagnostically required structural or operational characteristics of the equipment and prevent the use of the equipment for its intended diagnostic purpose. This paragraph (f) does not excuse compliance with other technical requirements where compliance with those requirements does not prevent the use of the equipment for its diagnostic purpose.

## § 35.212 Existing medical diagnostic equipment.

- (a) ***Accessibility.*** A public entity shall operate each service, program, or activity offered through or with the use of MDE so that the service, program, or activity, in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph (a) does not—

- (1) Necessarily require a public entity to make each of its existing pieces of MDE accessible to and usable by individuals with disabilities; or
- (2) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this paragraph (a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or their designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services, programs, and activities provided by the public entity.
- (3) A public entity meets its burden of proving that compliance with this paragraph (a) would result in a fundamental alteration under paragraph (a)(2) of this section if it demonstrates that compliance with this paragraph (a) would alter diagnostically required structural or operational characteristics of the equipment and prevent the use of the equipment for its intended diagnostic purpose.

- (b) ***Methods.*** A public entity may comply with the requirements of this section through such means as reassignment of services to alternate accessible locations; home visits; delivery of services at alternate accessible sites; purchase, lease, or other acquisition of accessible MDE; or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to purchase, lease, or otherwise acquire accessible MDE where other methods are effective in achieving compliance with this section. In choosing among available

methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

## § 35.213 Qualified staff.

Public entities must ensure their staff are able to successfully operate accessible MDE, assist with transfers and positioning of individuals with disabilities, and carry out the program access obligation regarding existing MDE.

## §§ 35.214-35.219 [Reserved]

## Appendix A to Part 35—Guidance to Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services

Note: This Appendix contains guidance providing a section-by-section analysis of the revisions to 28 CFR part 35 published on September 15, 2010.

## Section-By-Section Analysis and Response to Public Comments

This section provides a detailed description of the Department's changes to the title II regulation, the reasoning behind those changes, and responses to public comments received on these topics. The Section-by-Section Analysis follows the order of the title II regulation itself, except that, if the Department has not changed a regulatory section, the unchanged section has not been mentioned.

### Subpart A—General

#### Section 35.104 Definitions.

##### “1991 Standards” and “2004 ADAAG”

The Department has included in the final rule new definitions of both the “1991 Standards” and the “2004 ADAAG.” The term “1991 Standards” refers to the ADA Standards for Accessible Design, originally published on July 26, 1991, and republished as Appendix D to part 36. The term “2004 ADAAG” refers to ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines, which were issued by the Access Board on July 23, 2004, 36 CFR 1191, app. B and D (2009), and which the Department has adopted in this final rule. These terms are included in the definitions section for ease of reference.

##### “2010 Standards”

The Department has added to the final rule a definition of the term “2010 Standards.” The term “2010 Standards” refers to the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in § 35.151.

## “Auxiliary Aids and Services”

In the NPRM, the Department proposed revisions to the definition of auxiliary aids and services under § 35.104 to include several additional types of auxiliary aids that have become more readily available since the promulgation of the 1991 title II regulation, and in recognition of new technology and devices available in some places that may provide effective communication in some situations.

The NPRM proposed adding an explicit reference to written notes in the definition of “auxiliary aids.” Although this policy was already enunciated in the Department’s 1993 Title II Technical Assistance Manual at II-7.1000, the Department proposed inclusion in the regulation itself because some Title II entities do not understand that exchange of written notes using paper and pencil is an available option in some circumstances. See Department of Justice, *The Americans with Disabilities Act, Title II Technical Assistance Manual Covering State and Local Government Programs and Services* (1993), available at <http://www.ada.gov/taman2.html>. Comments from several disability advocacy organizations and individuals discouraged the Department from including the exchange of written notes in the list of available auxiliary aids in § 35.104. Advocates and persons with disabilities requested explicit limits on the use of written notes as a form of auxiliary aid because, they argue, most exchanges are not simple and are not communicated effectively using handwritten notes. One major advocacy organization, for example, noted that the speed at which individuals communicate orally or use sign language averages about 200 words per minute or more while exchange of notes often leads to truncated or incomplete communication. For persons whose primary language is American Sign Language (ASL), some commenters pointed out, using written English in exchange of notes often is ineffective because ASL syntax and vocabulary is dissimilar from English. By contrast, some commenters from professional medical associations sought more specific guidance on when notes are allowed, especially in the context of medical offices and health care situations.

Exchange of notes likely will be effective in situations that do not involve substantial conversation, for example, blood work for routine lab tests or regular allergy shots. Video Interpreting Services (hereinafter referred to as “video remote interpreting services” or VRI) or an interpreter should be used when the matter involves greater complexity, such as in situations requiring communication of medical history or diagnoses, in conversations about medical procedures and treatment decisions, or when giving instructions for care at home or elsewhere. In the Section-By-Section Analysis of § 35.160 (Communications) below, the Department discusses in greater detail the kinds of situations in which interpreters or captioning would be necessary. Additional guidance on this issue can be found in a number of agreements entered into with health-care providers and hospitals that are available on the Department’s Web site at <http://www.ada.gov>.

In the NPRM, in paragraph (1) of the definition in § 35.104, the Department proposed replacing the term “telecommunications devices for deaf persons (TDD)” with the term “text telephones (TTYs).” TTY has become the commonly accepted term and is consistent with the terminology used by the Access Board in the 2004 ADAAG. Commenters representing advocates and persons with disabilities expressed approval of the substitution of TTY for TDD in the proposed regulation.

Commenters also expressed the view that the Department should expand paragraph (1) of the definition of auxiliary aids to include “TTY’s and other voice, text, and video-based telecommunications products and systems such as videophones and captioned telephones.” The Department has considered these comments and has revised the definition of “auxiliary aids” to include references to voice, text, and video-based telecommunications products and systems, as well as accessible electronic and information technology.

In the NPRM, the Department also proposed including a reference in paragraph (1) to a new technology, Video Interpreting Services (VIS). The reference remains in the final rule. VIS is discussed in the Section-By-Section Analysis below in reference to § 35.160 (Communications), but is referred to as VRI in both the final rule and Appendix A to more accurately reflect the terminology used in other regulations and among users of the technology.

In the NPRM, the Department noted that technological advances in the 18 years since the ADA's enactment had increased the range of auxiliary aids and services for those who are blind or have low vision. As a result the Department proposed additional examples to paragraph (2) of the definition, including Brailled materials and displays, screen reader software, optical readers, secondary auditory programs (SAP), and accessible electronic and information technology. Some commenters asked for more detailed requirements for auxiliary aids for persons with vision disabilities. The Department has decided it will not make additional changes to that provision at this time.

Several comments suggested expanding the auxiliary aids provision for persons who are both deaf and blind, and in particular, to include in the list of auxiliary aids a new category, "support service providers (SSP)," which was described in comments as a navigator and communication facilitator. The Department believes that services provided by communication facilitators are already encompassed in the requirement to provide qualified interpreters. Moreover, the Department is concerned that as described by the commenters, the category of support service providers would include some services that would be considered personal services and that do not qualify as auxiliary aids. Accordingly, the Department declines to add this new category to the list at this time.

Some commenters representing advocacy organizations and individuals asked the Department to explicitly require title II entities to make any or all of the devices or technology available in all situations upon the request of the person with a disability. The Department recognizes that such devices or technology may provide effective communication and in some circumstances may be effective for some persons, but the Department does not intend to require that every entity covered by title II provide every device or all new technology at all times as long as the communication that is provided is as effective as communication with others. The Department recognized in the preamble to the 1991 title II regulation that the list of auxiliary aids was "not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. It is not possible to provide an exhaustive list, and an attempt to do so would omit the new devices that will become available with emerging technology." 28 CFR part 35, app. A at 560 (2009). The Department continues to endorse that view; thus, the inclusion of a list of examples of possible auxiliary aids in the definition of "auxiliary aids" should not be read as a mandate for a title II entity to offer every possible auxiliary aid listed in the definition in every situation.

## "Direct Threat"

In Appendix A of the Department's 1991 title II regulation, the Department included a detailed discussion of "direct threat" that, among other things, explained that "the principles established in § 36.208 of the Department's [title III] regulation" were "applicable" as well to title II, insofar as "questions of safety are involved." 28 CFR part 35, app. A at 565 (2009). In the final rule, the Department has included an explicit definition of "direct threat" that is parallel to the definition in the title III rule and placed it in the definitions section at § 35.104.

## "Existing Facility"

The 1991 title II regulation provided definitions for “new construction” at § 35.151(a) and “alterations” at § 35.151(b). In contrast, the term “existing facility” was not explicitly defined, although it is used in the statute and regulations for title II. See 42 U.S.C. 12134(b); 28 CFR 35.150. It has been the Department’s view that newly constructed or altered facilities are also existing facilities with continuing program access obligations, and that view is made explicit in this rule.

The classification of facilities under the ADA is neither static nor mutually exclusive. Newly constructed or altered facilities are also existing facilities. A newly constructed facility remains subject to the accessibility standards in effect at the time of design and construction, with respect to those elements for which, at that time, there were applicable ADA Standards. And at some point, the facility may undergo alterations, which are subject to the alterations requirements in effect at the time. See § 35.151(b)-(c). The fact that the facility is also an existing facility does not relieve the public entity of its obligations under the new construction and alterations requirements in this part.

For example, a facility constructed or altered after the effective date of the original title II regulations but prior to the effective date of the revised title II regulation and Standards, must have been built or altered in compliance with the Standards (or UFAS) in effect at that time, in order to be in compliance with the ADA. In addition, a “newly constructed” facility or “altered” facility is also an “existing facility” for purposes of application of the title II program accessibility requirements. Once the 2010 Standards take effect, they will become the new reference point for determining the program accessibility obligations of all existing facilities. This is because the ADA contemplates that as our knowledge and understanding of accessibility advances and evolves, this knowledge will be incorporated into and result in increased accessibility in the built environment. Under title II, this goal is accomplished through the statute’s program access framework. While newly constructed or altered facilities must meet the accessibility standards in effect at the time, the fact that these facilities are also existing facilities ensures that the determination of whether a program is accessible is not frozen at the time of construction or alteration. Program access may require consideration of potential barriers to access that were not recognized as such at the time of construction or alteration, including, but not limited to, the elements that are first covered in the 2010 Standards, as that term is defined in § 35.104. Adoption of the 2010 Standards establishes a new reference point for title II entities that choose to make structural changes to existing facilities to meet their program access requirements.

The NPRM included the following proposed definition of “existing facility.” “A facility that has been constructed and remains in existence on any given date.” 73 FR 34466, 34504 (June 17, 2008). The Department received a number of comments on this issue. The commenters urged the Department to clarify that all buildings remain subject to the standards in effect at the time of their construction, that is, that a facility designed and constructed for first occupancy between January 26, 1992, and the effective date of the final rule is still considered “new construction” and that alterations occurring between January 26, 1992, and the effective date of the final rule are still considered “alterations.”

The final rule includes clarifying language to ensure that the Department’s interpretation is accurately reflected. As established by this rule, existing facility means a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part. Thus, this definition reflects the Department’s interpretation that public entities have program access requirements that are independent of, but may coexist with, requirements imposed by new construction or alteration requirements in those same facilities.

## **“Housing at a Place of Education”**

The Department has added a new definition to § 35.104, “housing at a place of education,” to clarify the types of educational housing programs that are covered by this title. This section defines “housing at a place of education” as “housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence.” This definition does not apply to social service programs that combine residential housing with social services, such as a residential job training program.

### **“Other Power-Driven Mobility Device” and “Wheelchair”**

Because relatively few individuals with disabilities were using nontraditional mobility devices in 1991, there was no pressing need for the 1991 title II regulation to define the terms “wheelchair” or “other power-driven mobility device,” to expound on what would constitute a reasonable modification in policies, practices, or procedures under § 35.130(b)(7), or to set forth within that section specific requirements for the accommodation of mobility devices. Since the issuance of the 1991 title II regulation, however, the choices of mobility devices available to individuals with disabilities have increased dramatically. The Department has received complaints about and has become aware of situations where individuals with mobility disabilities have utilized devices that are not designed primarily for use by an individual with a mobility disability, including the Segway ® Personal Transporter (Segway ® PT), golf cars, all-terrain vehicles (ATVs), and other locomotion devices.

The Department also has received questions from public entities and individuals with mobility disabilities concerning which mobility devices must be accommodated and under what circumstances. Indeed, there has been litigation concerning the legal obligations of covered entities to accommodate individuals with mobility disabilities who wish to use an electronic personal assistance mobility device (EPAMD), such as the Segway ® PT, as a mobility device. The Department has participated in such litigation as *amicus curiae*. See *Ault v. Walt Disney World Co.*, No. 6:07-cv-1785-Orl-31KRS, 2009 WL 3242028 (M.D. Fla. Oct. 6, 2009). Much of the litigation has involved shopping malls where businesses have refused to allow persons with disabilities to use EPAMDs. See, e.g., *McElroy v. Simon Property Group*, No. 08-404 RDR, 2008 WL 4277716 (D. Kan. Sept. 15, 2008) (enjoining mall from prohibiting the use of a Segway ® PT as a mobility device where an individual agrees to all of a mall's policies for use of the device, except indemnification); Shasta Clark, *Local Man Fighting Mall Over Right to Use Segway*, WATE 6 News, July 26, 2005, available at <http://www.wate.com/Global/story.asp?s=3643674> (last visited June 24, 2010).

In response to questions and complaints from individuals with disabilities and covered entities concerning which mobility devices must be accommodated and under what circumstances, the Department began developing a framework to address the use of unique mobility devices, concerns about their safety, and the parameters for the circumstances under which these devices must be accommodated. As a result, the Department's NPRM proposed two new approaches to mobility devices. First, the Department proposed a two-tiered mobility device definition that defined the term “wheelchair” separately from “other power-driven mobility device.” Second, the Department proposed requirements to allow the use of devices in each definitional category. In § 35.137(a), the NPRM proposed that wheelchairs and manually-powered mobility aids used by individuals with mobility disabilities shall be permitted in any areas open to pedestrian use. Section 35.137(b) of the NPRM provided that a public entity “shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public entity can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration of the public entity's service, program, or activity.” 73 FR 34466, 34504 (June 17, 2008).

The Department sought public comment with regard to whether these steps would, in fact, achieve clarity on these issues. Toward this end, the Department's NPRM asked several questions relating to the definitions of “wheelchair,” “other power-driven mobility device,” and “manually-powered mobility aids”; the best way to categorize different classes of mobility devices; the types of devices that should be included in each category; and the circumstances under which certain mobility devices must be accommodated or may be excluded pursuant to the policy adopted by the public entity.

Because the questions in the NPRM that concerned mobility devices and their accommodation were interrelated, many of the commenters' responses did not identify the specific question to which they were responding. Instead, the commenters grouped the questions together and provided comments accordingly. Most commenters spoke to the issues addressed in the Department's questions in broad terms and general concepts. As a result, the responses to the questions posed are discussed below in broadly grouped issue categories rather than on a question-by-question basis.

***Two-tiered definitional approach.*** Commenters supported the Department's proposal to use a two-tiered definition of mobility device. Commenters nearly universally said that wheelchairs always should be accommodated and that they should never be subject to an assessment with regard to their admission to a particular public facility. In contrast, the vast majority of commenters indicated they were in favor of allowing public entities to conduct an assessment as to whether, and under which circumstances, other power-driven mobility devices would be allowed on-site.

Many commenters indicated their support for the two-tiered approach in responding to questions concerning the definition of “wheelchair” and “other-powered mobility device.” Nearly every disability advocacy group said that the Department's two-tiered approach strikes the proper balance between ensuring access for individuals with disabilities and addressing fundamental alteration and safety concerns held by public entities; however, a minority of disability advocacy groups wanted other power-driven mobility devices to be included in the definition of “wheelchair.” Most advocacy, nonprofit, and individual commenters supported the concept of a separate definition for “other power-driven mobility device” because it maintains existing legal protections for wheelchairs while recognizing that some devices that are not designed primarily for individuals with mobility disabilities have beneficial uses for individuals with mobility disabilities. They also favored this concept because it recognizes technological developments and that the innovative uses of varying devices may provide increased access to individuals with mobility disabilities.

Many environmental, transit system, and government commenters indicated they opposed in its entirety the concept of “other power-driven mobility devices” as a separate category. They believe that the creation of a second category of mobility devices will mean that other power-driven mobility devices, specifically ATVs and off-highway vehicles, must be allowed to go anywhere on national park lands, trails, recreational areas, etc.; will conflict with other Federal land management laws and regulations; will harm the environment and natural and cultural resources; will pose safety risks to users of these devices, as well as to pedestrians not expecting to encounter motorized devices in these settings; will interfere with the recreational enjoyment of these areas; and will require too much administrative work to regulate which devices are allowed and under which circumstances. These commenters all advocated a single category of mobility devices that excludes all fuel-powered devices.

Whether or not they were opposed to the two-tier approach in its entirety, virtually every environmental commenter and most government commenters associated with providing public transportation services or protecting land, natural resources, fish and game, etc., said that the definition of “other power-driven mobility device” is too broad. They suggested that they might be able to support the dual category approach if the definition of “other power-driven mobility device” were narrowed. They expressed general

and program-specific concerns about permitting the use of other power-driven mobility devices. They noted the same concerns as those who opposed the two-tiered concept—that these devices create a host of environmental, safety, cost, administrative and conflict of law issues. Virtually all of these commenters indicated that their support for the dual approach and the concept of other power-driven mobility devices is, in large measure, due to the other power-driven mobility device assessment factors in § 35.137(c) of the NPRM.

By maintaining the two-tiered approach to mobility devices and defining “wheelchair” separately from “other power-driven mobility device,” the Department is able to preserve the protection users of traditional wheelchairs and other manually powered mobility aids have had since the ADA was enacted, while also recognizing that human ingenuity, personal choice, and new technologies have led to the use of devices that may be more beneficial for individuals with certain mobility disabilities.

Moreover, the Department believes the two-tiered approach gives public entities guidance to follow in assessing whether reasonable modifications can be made to permit the use of other power-driven mobility devices on-site and to aid in the development of policies describing the circumstances under which persons with disabilities may use such devices. The two-tiered approach neither mandates that all other power-driven mobility devices be accommodated in every circumstance, nor excludes these devices. This approach, in conjunction with the factor assessment provisions in § 35.137(b)(2), will serve as a mechanism by which public entities can evaluate their ability to accommodate other power-driven mobility devices. As will be discussed in more detail below, the assessment factors in § 35.137(b)(2) are designed to provide guidance to public entities regarding whether it is appropriate to bar the use of a specific “other power-driven mobility device in a specific facility. In making such a determination, a public entity must consider the device's type, size, weight, dimensions, and speed; the facility's volume of pedestrian traffic; the facility's design and operational characteristics; whether the device conflicts with legitimate safety requirements; and whether the device poses a substantial risk of serious harm to the immediate environment or natural or cultural resources, or conflicts with Federal land management laws or regulations. In addition, if under § 35.130(b)(7), the public entity claims that it cannot make reasonable modifications to its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with disabilities, the burden of proof to demonstrate that such devices cannot be operated in accordance with legitimate safety requirements rests upon the public entity.

*Categorization of wheelchair versus other power-driven mobility devices.* Implicit in the creation of the two-tiered mobility device concept is the question of how to categorize which devices are wheelchairs and which are other power-driven mobility devices. Finding weight and size to be too restrictive, the vast majority of advocacy, nonprofit, and individual commenters opposed using the Department of Transportation's definition of “common wheelchair” to designate the mobility device's appropriate category. Commenters who generally supported using weight and size as the method of categorization did so because of their concerns about potentially detrimental impacts on the environment and cultural and natural resources; on the enjoyment of the facility by other recreational users, as well as their safety; on the administrative components of government agencies required to assess which devices are appropriate on narrow, steeply sloped, or foot-and-hoof only trails; and about the impracticality of accommodating such devices in public transportation settings.

Many environmental, transit system, and government commenters also favored using the device's intended-use to categorize which devices constitute wheelchairs and which are other power-driven mobility devices. Furthermore, the intended-use determinant received a fair amount of support from advocacy, nonprofit, and individual commenters, either because they sought to preserve the broad accommodation of wheelchairs or because they sympathized with concerns about individuals without mobility disabilities fraudulently bringing other power-driven mobility devices into public facilities.

Commenters seeking to have the Segway® PT included in the definition of "wheelchair" objected to classifying mobility devices on the basis of their intended use because they felt that such a classification would be unfair and prejudicial to Segway® PT users and would stifle personal choice, creativity, and innovation. Other advocacy and nonprofit commenters objected to employing an intended-use approach because of concerns that the focus would shift to an assessment of the device, rather than the needs or benefits to the individual with the mobility disability. They were of the view that the mobility-device classification should be based on its function—whether it is used for a mobility disability. A few commenters raised the concern that an intended-use approach might embolden public entities to assess whether an individual with a mobility disability really needs to use the other power-driven mobility device at issue or to question why a wheelchair would not provide sufficient mobility. Those citing objections to the intended use determinant indicated it would be more appropriate to make the categorization determination based on whether the device is being used for a mobility disability in the context of the impact of its use in a specific environment. Some of these commenters preferred this approach because it would allow the Segway® PT to be included in the definition of "wheelchair."

Many environmental and government commenters were inclined to categorize mobility devices by the way in which they are powered, such as battery-powered engines versus fuel or combustion engines. One commenter suggested using exhaust level as the determinant. Although there were only a few commenters who would make the determination based on indoor or outdoor use, there was nearly universal support for banning the indoor use of devices that are powered by fuel or combustion engines.

A few commenters thought it would be appropriate to categorize the devices based on their maximum speed. Others objected to this approach, stating that circumstances should dictate the appropriate speed at which mobility devices should be operated—for example, a faster speed may be safer when crossing streets than it would be for sidewalk use—and merely because a device can go a certain speed does not mean it will be operated at that speed.

The Department has decided to maintain the device's intended use as the appropriate determinant for which devices are categorized as "wheelchairs." However, because wheelchairs may be intended for use by individuals who have temporary conditions affecting mobility, the Department has decided that it is more appropriate to use the phrase "primarily designed" rather than "solely designed" in making such categorizations. The Department will not foreclose any future technological developments by identifying or banning specific devices or setting restrictions on size, weight, or dimensions. Moreover, devices designed primarily for use by individuals with mobility disabilities often are considered to be medical devices and are generally eligible for insurance reimbursement on this basis. Finally, devices designed primarily for use by individuals with mobility disabilities are less subject to fraud concerns because they were not designed to have a recreational component. Consequently, rarely, if ever, is any inquiry or assessment as to their appropriateness for use in a public entity necessary.

**Definition of "wheelchair."** In seeking public feedback on the NPRM's definition of "wheelchair," the Department explained its concern that the definition of "wheelchair" in section 508(c)(2) of the ADA (formerly section 507(c)(2), July 26, 1990, 104 Stat. 372, 42 U.S.C. 12207, renumbered section 508(c)(2), Public Law 110-325 section 6(a)(2), Sept. 25, 2008, 122 Stat. 3558), which pertains to Federal wilderness areas, is not specific enough to provide clear guidance in the array of settings covered by title II and that the stringent size and weight requirements for the Department of Transportation's definition of "common wheelchair" are not a good fit in the context of most public entities. The Department noted in the NPRM that it sought a definition of "wheelchair" that would include manually-operated and power-driven wheelchairs and mobility scooters (i.e., those that typically are single-user, have three to four wheels, and are appropriate for both indoor and outdoor pedestrian areas), as well as a variety of types of wheelchairs and mobility scooters with individualized or unique features or models with different numbers of wheels. The NPRM

defined a wheelchair as “a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually-operated or power-driven.” 73 FR 34466, 34479 (June 17, 2008). Although the NPRM’s definition of “wheelchair” excluded mobility devices that are not designed solely for use by individuals with mobility disabilities, the Department, noting that the use of the Segway® PT by individuals with mobility disabilities is on the upswing, inquired as to whether this device should be included in the definition of “wheelchair.”

Many environment and Federal government employee commenters objected to the Department’s proposed definition of “wheelchair” because it differed from the definition of “wheelchair” found in section 508(c)(2) of the ADA—a definition used in the statute only in connection with a provision relating to the use of a wheelchair in a designated wilderness area. See 42 U.S.C. 12207(c)(1). Other government commenters associated with environmental issues wanted the phrase “outdoor pedestrian use” eliminated from the definition of “wheelchair.” Some transit system commenters wanted size, weight, and dimensions to be part of the definition because of concerns about costs associated with having to accommodate devices that exceed the dimensions of the “common wheelchair” upon which the 2004 ADAAG was based.

Many advocacy, nonprofit, and individual commenters indicated that as long as the Department intends the scope of the term “mobility impairments” to include other disabilities that cause mobility impairments (e.g., respiratory, circulatory, stamina, etc.), they were in support of the language. Several commenters indicated a preference for the definition of “wheelchair” in section 508(c)(2) of the ADA. One commenter indicated a preference for the term “assistive device,” as it is defined in the Rehabilitation Act of 1973, over the term “wheelchair.” A few commenters indicated that strollers should be added to the preamble’s list of examples of wheelchairs because parents of children with disabilities frequently use strollers as mobility devices until their children get older.

In the final rule, the Department has rearranged some wording and has made some changes in the terminology used in the definition of “wheelchair,” but essentially has retained the definition, and therefore the rationale, that was set forth in the NPRM. Again, the text of the ADA makes the definition of “wheelchair” contained in section 508(c)(2) applicable only to the specific context of uses in designated wilderness areas, and therefore does not compel the use of that definition for any other purpose. Moreover, the Department maintains that limiting the definition to devices suitable for use in an “indoor pedestrian area” as provided for in section 508(c)(2) of the ADA, would ignore the technological advances in wheelchair design that have occurred since the ADA went into effect and that the inclusion of the phrase “indoor pedestrian area” in the definition of “wheelchair” would set back progress made by individuals with mobility disabilities who, for many years now, have been using devices designed for locomotion in indoor *and* outdoor settings. The Department has concluded that same rationale applies to placing limits on the size, weight, and dimensions of wheelchairs.

With regard to the term “mobility impairments,” the Department intended a broad reading so that a wide range of disabilities, including circulatory and respiratory disabilities, that make walking difficult or impossible, would be included. In response to comments on this issue, the Department has revisited the issue and has concluded that the most apt term to achieve this intent is “mobility disability.”

In addition, the Department has decided that it is more appropriate to use the phrase “primarily” designed for use by individuals with disabilities in the final rule, rather than “solely” designed for use by individuals with disabilities—the phrase proposed in the NPRM. The Department believes that this phrase more accurately covers the range of devices the Department intends to fall within the definition of “wheelchair.”

After receiving comments that the word "typical" is vague and the phrase "pedestrian areas" is confusing to apply, particularly in the context of similar, but not identical, terms used in the proposed Standards, the Department decided to delete the term "typical indoor and outdoor pedestrian areas" from the final rule. Instead, the final rule references "indoor or of both indoor and outdoor locomotion," to make clear that the devices that fall within the definition of "wheelchair" are those that are used for locomotion on indoor and outdoor pedestrian paths or routes and not those that are intended exclusively for traversing undefined, unprepared, or unimproved paths or routes. Thus, the final rule defines the term "wheelchair" to mean "a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and outdoor locomotion."

**Whether the definition of "wheelchair" includes the Segway® PT.** As discussed above, because individuals with mobility disabilities are using the Segway® PT as a mobility device, the Department asked whether it should be included in the definition of "wheelchair." The basic Segway® PT model is a two-wheeled, gyroscopically-stabilized, battery-powered personal transportation device. The user stands on a platform suspended three inches off the ground by wheels on each side, grasps a T-shaped handle, and steers the device similarly to a bicycle. Most Segway® PTs can travel up to 12½ miles per hour, compared to the average pedestrian walking speed of three to four miles per hour and the approximate maximum speed for power-operated wheelchairs of six miles per hour. In a study of trail and other non-motorized transportation users including EPAMDs, the Federal Highway Administration (FHWA) found that the eye height of individuals using EPAMDs ranged from approximately 69 to 80 inches. See Federal Highway Administration, *Characteristics of Emerging Road and Trail Users and Their Safety* (Oct. 14, 2004), available at <http://www.fhwa.dot.gov/safety/pubs/04103> (last visited June 24, 2010). Thus, the Segway® PT can operate at much greater speeds than wheelchairs, and the average user stands much taller than most wheelchair users.

The Segway® PT has been the subject of debate among users, pedestrians, disability advocates, State and local governments, businesses, and bicyclists. The fact that the Segway® PT is not designed primarily for use by individuals with disabilities, nor used primarily by persons with disabilities, complicates the question of to what extent individuals with disabilities should be allowed to operate them in areas and facilities where other power-driven mobility devices are not allowed. Those who question the use of the Segway® PT in pedestrian areas argue that the speed, size, and operating features of the devices make them too dangerous to operate alongside pedestrians and wheelchair users.

Comments regarding whether to include the Segway® PT in the definition of "wheelchair" were, by far, the most numerous received in the category of comments regarding wheelchairs and other power-driven mobility devices. Significant numbers of veterans with disabilities, individuals with multiple sclerosis, and those advocating on their behalf made concise statements of general support for the inclusion of the Segway® PT in the definition of "wheelchair." Two veterans offered extensive comments on the topic, along with a few advocacy and nonprofit groups and individuals with disabilities for whom sitting is uncomfortable or impossible.

While there may be legitimate safety issues for EPAMD users and bystanders in some circumstances, EPAMDs and other non-traditional mobility devices can deliver real benefits to individuals with disabilities. Among the reasons given by commenters to include the Segway® PT in the definition of "wheelchair" were that the Segway® PT is well-suited for individuals with particular conditions that affect mobility including multiple sclerosis, Parkinson's disease, chronic obstructive pulmonary disease, amputations, spinal cord injuries, and other neurological disabilities, as well as functional limitations, such as gait limitation, inability to sit or discomfort in sitting, and diminished stamina issues. Such individuals often find that EPAMDs are more comfortable and easier to use than more traditional mobility devices and assist with balance, circulation, and digestion in ways that wheelchairs do not. See Rachel Metz, *Disabled*

*Embrace Segway*, New York Times, Oct. 14, 2004. Commenters specifically cited pressure relief, reduced spasticity, increased stamina, and improved respiratory, neurologic, and muscular health as secondary medical benefits from being able to stand.

Other arguments for including the Segway® PT in the definition of "wheelchair" were based on commenters' views that the Segway® PT offers benefits not provided by wheelchairs and mobility scooters, including its intuitive response to body movement, ability to operate with less coordination and dexterity than is required for many wheelchairs and mobility scooters, and smaller footprint and turning radius as compared to most wheelchairs and mobility scooters. Several commenters mentioned improved visibility, either due to the Segway® PT's raised platform or simply by virtue of being in a standing position. And finally, some commenters advocated for the inclusion of the Segway® PT simply based on civil rights arguments and the empowerment and self-esteem obtained from having the power to select the mobility device of choice.

Many commenters, regardless of their position on whether to include the Segway® PT in the definition of "wheelchair," noted that the Segway® PT's safety record is as good as, if not better, than the record for wheelchairs and mobility scooters.

Most environmental, transit system, and government commenters were opposed to including the Segway® PT in the definition of "wheelchair" but were supportive of its inclusion as an "other power-driven mobility device." Their concerns about including the Segway® PT in the definition of "wheelchair" had to do with the safety of the operators of these devices (e.g., height clearances on trains and sloping trails in parks) and of pedestrians, particularly in confined and crowded facilities or in settings where motorized devices might be unexpected; the potential harm to the environment; the additional administrative, insurance, liability, and defensive litigation costs; potentially detrimental impacts on the environment and cultural and natural resources; and the impracticality of accommodating such devices in public transportation settings.

Other environmental, transit system, and government commenters would have banned all fuel-powered devices as mobility devices. In addition, these commenters would have classified non-motorized devices as "wheelchairs" and would have categorized motorized devices, such as the Segway® PT, battery-operated wheelchairs, and mobility scooters as "other power-driven mobility devices." In support of this position, some of these commenters argued that because their equipment and facilities have been designed to comply with the dimensions of the "common wheelchair" upon which the ADAAG is based, any device that is larger than the prototype wheelchair would be misplaced in the definition of "wheelchair."

Still others in this group of commenters wished for only a single category of mobility devices and would have included wheelchairs, mobility scooters, and the Segway® PT as "mobility devices" and excluded fuel-powered devices from that definition.

Many disability advocacy and nonprofit commenters did not support the inclusion of the Segway® PT in the definition of "wheelchair." Paramount to these commenters was the maintenance of existing protections for wheelchair users. Because there was unanimous agreement that wheelchair use rarely, if ever, may be restricted, these commenters strongly favored categorizing wheelchairs separately from the Segway® PT and other power-driven mobility devices and applying the intended-use determinant to assign the devices to either category. They indicated that while they support the greatest degree of access in public entities for all persons with disabilities who require the use of mobility devices, they recognize that under certain circumstances, allowing the use of other power-driven mobility devices would result in a fundamental alteration of programs, services, or activities, or run counter to legitimate safety requirements necessary for the safe operation of a public entity. While these groups supported

categorizing the Segway® PT as an “other power-driven mobility device,” they universally noted that in their view, because the Segway® PT does not present environmental concerns and is as safe to use as, if not safer than, a wheelchair, it should be accommodated in most circumstances.

The Department has considered all the comments and has concluded that it should not include the Segway® PT in the definition of “wheelchair.” The final rule provides that the test for categorizing a device as a wheelchair or an other power-driven mobility device is whether the device is designed primarily for use by individuals with mobility disabilities. Mobility scooters are included in the definition of “wheelchair” because they are designed primarily for users with mobility disabilities. However, because the current generation of EPAMDs, including the Segway® PT, was designed for recreational users and not primarily for use by individuals with mobility disabilities, the Department has decided to continue its approach of excluding EPAMDs from the definition of “wheelchair” and including them in the definition of “other power-driven mobility device.” Although EPAMDs, such as the Segway® PT, are not included in the definition of a “wheelchair,” public entities must assess whether they can make reasonable modifications to permit individuals with mobility disabilities to use such devices on their premises. The Department recognizes that the Segway® PT provides many benefits to those who use them as mobility devices, including a measure of privacy with regard to the nature of one’s particular disability, and believes that in the vast majority of circumstances, the application of the factors described in § 35.137 for providing access to other-powered mobility devices will result in the admission of the Segway® PT.

**Treatment of “manually-powered mobility aids.”** The Department’s NPRM did not define the term “manually-powered mobility aids.” Instead, the NPRM included a non-exhaustive list of examples in § 35.137(a). The NPRM queried whether the Department should maintain this approach to manually-powered mobility aids or whether it should adopt a more formal definition.

Only a few commenters addressed “manually-powered mobility aids.” Virtually all commenters were in favor of maintaining a non-exhaustive list of examples of “manually-powered mobility aids” rather than adopting a definition of the term. Of those who commented, a few sought clarification of the term “manually-powered.” One commenter suggested that the term be changed to “human-powered.” Other commenters requested that the Department include ordinary strollers in the non-exhaustive list of “manually-powered mobility aids.” Since strollers are not devices designed primarily for individuals with mobility disabilities, the Department does not consider them to be manually-powered mobility aids; however, strollers used in the context of transporting individuals with disabilities are subject to the same assessment required by the ADA’s title II reasonable modification standards at § 35.130(b)(7). The Department believes that because the existing approach is clear and understood easily by the public, no formal definition of the term “manually-powered mobility aids” is required.

**Definition of “other power-driven mobility device.”** The Department’s NPRM defined the term “other power-driven mobility device” in § 35.104 as “any of a large range of devices powered by batteries, fuel, or other engines—whether or not designed solely for use by individuals with mobility impairments—that are used by individuals with mobility impairments for the purpose of locomotion, including golf cars, bicycles, electronic personal assistance mobility devices (EPAMDs), or any mobility aid designed to operate in areas without defined pedestrian routes.” 73 FR 34466, 34504 (June 17, 2008).

Nearly all environmental, transit systems, and government commenters who supported the two-tiered concept of mobility devices said that the Department’s definition of “other power-driven mobility device” is overbroad because it includes fuel-powered devices. These commenters sought a ban on fuel-powered devices in their entirety because they believe they are inherently dangerous and pose environmental and

safety concerns. They also argued that permitting the use of many of the contemplated other power-driven mobility devices, fuel-powered ones especially, would fundamentally alter the programs, services, or activities of public entities.

Advocacy, nonprofit, and several individual commenters supported the definition of “other power-driven mobility device” because it allows new technologies to be added in the future, maintains the existing legal protections for wheelchairs, and recognizes that some devices, particularly the Segway® PT, which are not designed primarily for individuals with mobility disabilities, have beneficial uses for individuals with mobility disabilities. Despite support for the definition of “other power-driven mobility device,” however, most advocacy and nonprofit commenters expressed at least some hesitation about the inclusion of fuel-powered mobility devices in the definition. While virtually all of these commenters noted that a blanket exclusion of any device that falls under the definition of “other power-driven mobility device” would violate basic civil rights concepts, they also specifically stated that certain devices, particularly, off-highway vehicles, cannot be permitted in certain circumstances. They also made a distinction between the Segway® PT and other power-driven mobility devices, noting that the Segway® PT should be accommodated in most circumstances because it satisfies the safety and environmental elements of the policy analysis. These commenters indicated that they agree that other power-driven mobility devices must be assessed, particularly as to their environmental impact, before they are accommodated.

Although many commenters had reservations about the inclusion of fuel-powered devices in the definition of other power-driven mobility devices, the Department does not want the definition to be so narrow that it would foreclose the inclusion of new technological developments (whether powered by fuel or by some other means). It is for this reason that the Department has maintained the phrase “any mobility device designed to operate in areas without defined pedestrian routes” in the final rule’s definition of other power-driven mobility devices. The Department believes that the limitations provided by “fundamental alteration” and the ability to impose legitimate safety requirements will likely prevent the use of fuel and combustion engine-driven devices indoors, as well as in outdoor areas with heavy pedestrian traffic. The Department notes, however, that in the future, technological developments may result in the production of safe fuel-powered mobility devices that do not pose environmental and safety concerns. The final rule allows consideration to be given as to whether the use of a fuel-powered device would create a substantial risk of serious harm to the environment or natural or cultural resources, and to whether the use of such a device conflicts with Federal land management laws or regulations; this aspect of the final rule will further limit the inclusion of fuel-powered devices where they are not appropriate. Consequently, the Department has maintained fuel-powered devices in the definition of “other power-driven mobility device.” The Department has also added language to the definition of “other power-driven mobility device” to reiterate that the definition does not apply to Federal wilderness areas, which are not covered by title II of the ADA; the use of wheelchairs in such areas is governed by section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

### **“Qualified Interpreter”**

In the NPRM, the Department proposed adding language to the definition of “qualified interpreter” to clarify that the term includes, but is not limited to, sign language interpreters, oral interpreters, and cued-speech interpreters. As the Department explained, not all interpreters are qualified for all situations. For example, a qualified interpreter who uses American Sign Language (ASL) is not necessarily qualified to interpret orally. In addition, someone with only a rudimentary familiarity with sign language or finger spelling is not qualified, nor is someone who is fluent in sign language but unable to translate spoken communication into ASL or to translate signed communication into spoken words.

As further explained, different situations will require different types of interpreters. For example, an oral interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing may be necessary for an individual who was raised orally and taught to read lips or was diagnosed with hearing loss later in life and does not know sign language. An individual who is deaf or hard of hearing may need an oral interpreter if the speaker's voice is unclear, if there is a quick-paced exchange of communication (e.g., in a meeting), or when the speaker does not directly face the individual who is deaf or hard of hearing. A cued-speech interpreter functions in the same manner as an oral interpreter except that he or she also uses a hand code or cue to represent each speech sound.

The Department received many comments regarding the proposed modifications to the definition of “interpreter.” Many commenters requested that the Department include within the definition a requirement that interpreters be certified, particularly if they reside in a State that licenses or certifies interpreters. Other commenters opposed a certification requirement as unduly limiting, noting that an interpreter may well be qualified even if that same interpreter is not certified. These commenters noted the absence of nationwide standards or universally accepted criteria for certification.

On review of this issue, the Department has decided against imposing a certification requirement under the ADA. It is sufficient under the ADA that the interpreter be qualified. However, as the Department stated in the original preamble, this rule does not invalidate or limit State or local laws that impose standards for interpreters that are equal to or more stringent than those imposed by this definition. See 28 CFR part 35, app. A at 566 (2009). For instance, the definition would not supersede any requirement of State law for use of a certified interpreter in court proceedings.

With respect to the proposed additions to the rule, most commenters supported the expansion of the list of qualified interpreters, and some advocated for the inclusion of other types of interpreters on the list as well, such as deaf-blind interpreters, certified deaf interpreters, and speech-to-speech interpreters. As these commenters explained, deaf-blind interpreters are interpreters who have specialized skills and training to interpret for individuals who are deaf and blind; certified deaf interpreters are deaf or hard of hearing interpreters who work with hearing sign language interpreters to meet the specific communication needs of deaf individuals; and speech-to-speech interpreters have special skill and training to interpret for individuals who have speech disabilities.

The list of interpreters in the definition of qualified interpreter is illustrative, and the Department does not believe it necessary or appropriate to attempt to provide an exhaustive list of qualified interpreters. Accordingly, the Department has decided not to expand the proposed list. However, if a deaf and blind individual needs interpreter services, an interpreter who is qualified to handle the needs of that individual may be required. The guiding criterion is that the public entity must provide appropriate auxiliary aids and services to ensure effective communication with the individual. Commenters also suggested various definitions for the term “cued-speech interpreters,” and different descriptions of the tasks they performed. After reviewing the various comments, the Department has determined that it is more accurate and appropriate to refer to such individuals as “cued-language transliterators.” Likewise, the Department has changed the term “oral interpreters” to “oral transliterators.” These two changes have been made to distinguish between sign language interpreters, who translate one language into another language (e.g., ASL to English and English to ASL), from transliterators who interpret within the same language between deaf and hearing individuals. A cued-language transliterator is an interpreter who has special skill and training in the use of the Cued Speech system of handshapes and placements, along with non-manual information, such as facial expression and body language, to show auditory information visually, including speech and environmental sounds. An oral transliterator is an interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing. While the

Department included definitions for "cued-speech interpreter" and "oral interpreter" in the regulatory text proposed in the NPRM, the Department has decided that it is unnecessary to include such definitions in the text of the final rule.

Many commenters questioned the proposed deletion of the requirement that a qualified interpreter be able to interpret both receptively and expressively, noting the importance of both these skills.

Commenters stated that this phrase was carefully crafted in the original regulation to make certain that interpreters both (1) are capable of understanding what a person with a disability is saying and (2) have the skills needed to convey information back to that individual. These are two very different skill sets and both are equally important to achieve effective communication. For example, in a medical setting, a sign language interpreter must have the necessary skills to understand the grammar and syntax used by an ASL user (receptive skills) and the ability to interpret complicated medical information—presented by medical staff in English—back to that individual in ASL (expressive skills). The Department agrees and has put the phrase "both receptively and expressively" back in the definition.

Several advocacy groups suggested that the Department make clear in the definition of qualified interpreter that the interpreter may appear either on-site or remotely using a video remote interpreting (VRI) service. Given that the Department has included in this rule both a definition of VRI services and standards that such services must satisfy, such an addition to the definition of qualified interpreter is appropriate.

After consideration of all relevant information submitted during the public comment period, the Department has modified the definition from that initially proposed in the NPRM. The final definition now states that "[q]ualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators."

## "Qualified Reader"

The 1991 title II regulation identifies a qualified reader as an auxiliary aid, but did not define the term. See 28 CFR 35.104(2). Based upon the Department's investigation of complaints alleging that some entities have provided ineffective readers, the Department proposed in the NPRM to define "qualified reader" similarly to "qualified interpreter" to ensure that entities select qualified individuals to read an examination or other written information in an effective, accurate, and impartial manner. This proposal was suggested in order to make clear to public entities that a failure to provide a qualified reader to a person with a disability may constitute a violation of the requirement to provide appropriate auxiliary aids and services.

The Department received comments supporting inclusion in the regulation of a definition of a "qualified reader." Some commenters suggested the Department add to the definition a requirement prohibiting the use of a reader whose accent, diction, or pronunciation makes full comprehension of material being read difficult. Another commenter requested that the Department include a requirement that the reader "will follow the directions of the person for whom he or she is reading." Commenters also requested that the Department define "accurately" and "effectively" as used in this definition.

While the Department believes that its proposed regulatory definition adequately addresses these concerns, the Department emphasizes that a reader, in order to be "qualified," must be skilled in reading the language and subject matter and must be able to be easily understood by the individual with the disability. For example, if a reader is reading aloud the questions for a college microbiology examination, that reader, in order to be qualified, must know the proper pronunciation of scientific terminology used in

the text, and must be sufficiently articulate to be easily understood by the individual with a disability for whom he or she is reading. In addition, the terms "effectively" and "accurately" have been successfully used and understood in the Department's existing definition of "qualified interpreter" since 1991 without specific regulatory definitions. Instead, the Department has relied upon the common use and understanding of those terms from standard English dictionaries. Thus, the definition of "qualified reader" has not been changed from that contained in the NPRM. The final rule defines "qualified reader" to mean "a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary."

## "Service Animal"

Although there is no specific language in the 1991 title II regulation concerning service animals, title II entities have the same legal obligations as title III entities to make reasonable modifications in policies, practices, or procedures to allow service animals when necessary in order to avoid discrimination on the basis of disability, unless the entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. See 28 CFR 35.130(b)(7). The 1991 title III regulation, 28 CFR 36.104, defines a "service animal" as "any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items." Section 36.302(c)(1) of the 1991 title III regulation requires that "[g]enerally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability." Section 36.302(c)(2) of the 1991 title III regulation states that "a public accommodation [is not required] to supervise or care for a service animal."

The Department has issued guidance and provided technical assistance and publications concerning service animals since the 1991 regulations became effective. In the NPRM, the Department proposed to modify the definition of service animal, added the definition to title II, and asked for public input on several issues related to the service animal provisions of the title II regulation: whether the Department should clarify the phrase "providing minimal protection" in the definition or remove it; whether there are any circumstances where a service animal "providing minimal protection" would be appropriate or expected; whether certain species should be eliminated from the definition of "service animal," and, if so, which types of animals should be excluded; whether "common domestic animal" should be part of the definition; and whether a size or weight limitation should be imposed for common domestic animals even if the animal satisfies the "common domestic animal" part of the NPRM definition.

The Department received extensive comments on these issues, as well as requests to clarify the obligations of State and local government entities to accommodate individuals with disabilities who use service animals, and has modified the final rule in response. In the interests of avoiding unnecessary repetition, the Department has elected to discuss the issues raised in the NPRM questions about service animals and the corresponding public comments in the following discussion of the definition of "service animal."

The Department's final rule defines "service animal" as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks,

alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition."

This definition has been designed to clarify a key provision of the ADA. Many covered entities indicated that they are confused regarding their obligations under the ADA with regard to individuals with disabilities who use service animals. Individuals with disabilities who use trained guide or service dogs are concerned that if untrained or unusual animals are termed "service animals," their own right to use guide or service dogs may become unnecessarily restricted or questioned. Some individuals who are not individuals with disabilities have claimed, whether fraudulently or sincerely (albeit mistakenly), that their animals are service animals covered by the ADA, in order to gain access to courthouses, city or county administrative offices, and other title II facilities. The increasing use of wild, exotic, or unusual species, many of which are untrained, as service animals has also added to the confusion.

Finally, individuals with disabilities who have the legal right under the Fair Housing Act (FHA) to use certain animals in their homes as a reasonable accommodation to their disabilities have assumed that their animals also qualify under the ADA. This is not necessarily the case, as discussed below.

The Department recognizes the diverse needs and preferences of individuals with disabilities protected under the ADA, and does not wish to unnecessarily impede individual choice. Service animals play an integral role in the lives of many individuals with disabilities and, with the clarification provided by the final rule, individuals with disabilities will continue to be able to use their service animals as they go about their daily activities and civic interactions. The clarification will also help to ensure that the fraudulent or mistaken use of other animals not qualified as service animals under the ADA will be deterred. A more detailed analysis of the elements of the definition and the comments responsive to the service animal provisions of the NPRM follows.

**Providing minimal protection.** As previously noted, the 1991 title II regulation does not contain specific language concerning service animals. The 1991 title III regulation included language stating that "minimal protection" was a task that could be performed by an individually trained service animal for the benefit of an individual with a disability. In the Department's "ADA Business Brief on Service Animals" (2002), the Department interpreted the "minimal protection" language within the context of a seizure (*i.e.*, alerting and protecting a person who is having a seizure). The Department received many comments in response to the question of whether the "minimal protection" language should be clarified. Many commenters urged the removal of the "minimal protection" language from the service animal definition for two reasons:

- (1) The phrase can be interpreted to allow any dog that is trained to be aggressive to qualify as a service animal simply by pairing the animal with a person with a disability; and
- (2) the phrase can be interpreted to allow any untrained pet dog to qualify as a service animal, since many consider the mere presence of a dog to be a crime deterrent, and thus sufficient to meet the minimal protection standard. These commenters argued, and the Department agrees, that these interpretations were not contemplated under the original title III regulation, and, for the purposes of the final title II regulations, the meaning of "minimal protection" must be made clear.

While many commenters stated that they believe that the “minimal protection” language should be eliminated, other commenters recommended that the language be clarified, but retained.

Commenters favoring clarification of the term suggested that the Department explicitly exclude the function of attack or exclude those animals that are trained solely to be aggressive or protective.

Other commenters identified non-violent behavioral tasks that could be construed as minimally protective, such as interrupting self-mutilation, providing safety checks and room searches, reminding the individual to take medications, and protecting the individual from injury resulting from seizures or unconsciousness.

Several commenters noted that the existing direct threat defense, which allows the exclusion of a service animal if the animal exhibits unwarranted or unprovoked violent behavior or poses a direct threat, prevents the use of “attack dogs” as service animals. One commenter noted that the use of a service animal trained to provide “minimal protection” may impede access to care in an emergency, for example, where the first responder, usually a title II entity, is unable or reluctant to approach a person with a disability because the individual’s service animal is in a protective posture suggestive of aggression.

Many organizations and individuals stated that in the general dog training community, “protection” is code for attack or aggression training and should be removed from the definition. Commenters stated that there appears to be a broadly held misconception that aggression-trained animals are appropriate service animals for persons with post traumatic stress disorder (PTSD). While many individuals with PTSD may benefit by using a service animal, the work or tasks performed appropriately by such an animal would not involve unprovoked aggression but could include actively cuing the individual by nudging or pawing the individual to alert to the onset of an episode and removing the individual from the anxiety-provoking environment.

The Department recognizes that despite its best efforts to provide clarification, the “minimal protection” language appears to have been misinterpreted. While the Department maintains that protection from danger is one of the key functions that service animals perform for the benefit of persons with disabilities, the Department recognizes that an animal individually trained to provide aggressive protection, such as an attack dog, is not appropriately considered a service animal. Therefore, the Department has decided to modify the “minimal protection” language to read “non-violent protection,” thereby excluding so-called “attack dogs” or dogs with traditional “protection training” as service animals. The Department believes that this modification to the service animal definition will eliminate confusion, without restricting unnecessarily the type of work or tasks that service animals may perform. The Department’s modification also clarifies that the crime-deterrent effect of a dog’s presence, by itself, does not qualify as work or tasks for purposes of the service animal definition.

***Alerting to intruders.*** The phrase “alerting to intruders” is related to the issues of minimal protection and the work or tasks an animal may perform to meet the definition of a service animal. In the original 1991 regulatory text, this phrase was intended to identify service animals that alert individuals who are deaf or hard of hearing to the presence of others. This language has been misinterpreted by some to apply to dogs that are trained specifically to provide aggressive protection, resulting in the assertion that such training qualifies a dog as a service animal under the ADA. The Department reiterates that title II entities are not required to admit any animal whose use poses a direct threat under § 35.139. In addition, the Department has decided to remove the word “intruders” from the service animal definition and replace it with the phrase “the presence of people or sounds.” The Department believes this clarifies that so-called “attack training” or other aggressive response types of training that cause a dog to provide an aggressive response do not qualify a dog as a service animal under the ADA.

Conversely, if an individual uses a breed of dog that is perceived to be aggressive because of breed reputation, stereotype, or the history or experience the observer may have with other dogs, but the dog is under the control of the individual with a disability and does not exhibit aggressive behavior, the title II entity cannot exclude the individual or the animal from a State or local government program, service, or facility. The animal can only be removed if it engages in the behaviors mentioned in § 35.136(b) (as revised in the final rule) or if the presence of the animal constitutes a fundamental alteration to the nature of the service, program, or activity of the title II entity.

**Doing "work" or "performing tasks."** The NPRM proposed that the Department maintain the requirement, first articulated in the 1991 title III regulation, that in order to qualify as a service animal, the animal must "perform tasks" or "do work" for the individual with a disability. The phrases "perform tasks" and "do work" describe what an animal must do for the benefit of an individual with a disability in order to qualify as a service animal.

The Department received a number of comments in response to the NPRM proposal urging the removal of the term "do work" from the definition of a service animal. These commenters argued that the Department should emphasize the performance of tasks instead. The Department disagrees. Although the common definition of work includes the performance of tasks, the definition of work is somewhat broader, encompassing activities that do not appear to involve physical action.

One service dog user stated that in some cases, "critical forms of assistance can't be construed as physical tasks," noting that the manifestations of "brain-based disabilities," such as psychiatric disorders and autism, are as varied as their physical counterparts. The Department agrees with this statement but cautions that unless the animal is individually trained to do something that qualifies as work or a task, the animal is a pet or support animal and does not qualify for coverage as a service animal. A pet or support animal may be able to discern that the individual is in distress, but it is what the animal is trained to do in response to this awareness that distinguishes a service animal from an observant pet or support animal.

The NPRM contained an example of "doing work" that stated "a psychiatric service dog can help some individuals with dissociative identity disorder to remain grounded in time or place." 73 FR 34466, 34504 (June 17, 2008). Several commenters objected to the use of this example, arguing that grounding was not a "task" and therefore, the example inherently contradicted the basic premise that a service animal must perform a task in order to mitigate a disability. Other commenters stated that "grounding" should not be included as an example of "work" because it could lead to some individuals claiming that they should be able to use emotional support animals in public because the dog makes them feel calm or safe. By contrast, one commenter with experience in training service animals explained that grounding is a trained task based upon very specific behavioral indicators that can be observed and measured. These tasks are based upon input from mental health practitioners, dog trainers, and individuals with a history of working with psychiatric service dogs.

It is the Department's view that an animal that is trained to "ground" a person with a psychiatric disorder does work or performs a task that would qualify it as a service animal as compared to an untrained emotional support animal whose presence affects a person's disability. It is the fact that the animal is trained to respond to the individual's needs that distinguishes an animal as a service animal. The process must have two steps: Recognition and response. For example, if a service animal senses that a person is about to have a psychiatric episode and it is trained to respond for example, by nudging, barking, or removing the individual to a safe location until the episode subsides, then the animal has indeed performed a task or done work on behalf of the individual with the disability, as opposed to merely sensing an event.

One commenter suggested defining the term “task,” presumably to improve the understanding of the types of services performed by an animal that would be sufficient to qualify the animal for coverage. The Department believes that the common definition of the word “task” is sufficiently clear and that it is not necessary to add to the definitions section. However, the Department has added examples of other kinds of work or tasks to help illustrate and provide clarity to the definition. After careful evaluation of this issue, the Department has concluded that the phrases “do work” and “perform tasks” have been effective during the past two decades to illustrate the varied services provided by service animals for the benefit of individuals with all types of disabilities. Thus, the Department declines to depart from its longstanding approach at this time.

***Species limitations.*** When the Department originally issued its title III regulation in the early 1990s, the Department did not define the parameters of acceptable animal species. At that time, few anticipated the variety of animals that would be promoted as service animals in the years to come, which ranged from pigs and miniature horses to snakes, iguanas, and parrots. The Department has followed this particular issue closely, keeping current with the many unusual species of animals represented to be service animals. Thus, the Department has decided to refine further this aspect of the service animal definition in the final rule.

The Department received many comments from individuals and organizations recommending species limitations. Several of these commenters asserted that limiting the number of allowable species would help stop erosion of the public's trust, which has resulted in reduced access for many individuals with disabilities who use trained service animals that adhere to high behavioral standards. Several commenters suggested that other species would be acceptable if those animals could meet nationally recognized behavioral standards for trained service dogs. Other commenters asserted that certain species of animals (e.g., reptiles) cannot be trained to do work or perform tasks, so these animals would not be covered.

In the NPRM, the Department used the term “common domestic animal” in the service animal definition and excluded reptiles, rabbits, farm animals (including horses, miniature horses, ponies, pigs, and goats), ferrets, amphibians, and rodents from the service animal definition. 73 FR 34466, 34478 (June 17, 2008). However, the term “common domestic animal” is difficult to define with precision due to the increase in the number of domesticated species. Also, several State and local laws define a “domestic” animal as an animal that is not wild. The Department agrees with commenters' views that limiting the number and types of species recognized as service animals will provide greater predictability for State and local government entities as well as added assurance of access for individuals with disabilities who use dogs as service animals. As a consequence, the Department has decided to limit this rule's coverage of service animals to dogs, which are the most common service animals used by individuals with disabilities.

***Wild animals, monkeys, and other nonhuman primates.*** Numerous business entities endorsed a narrow definition of acceptable service animal species, and asserted that there are certain animals (e.g., reptiles) that cannot be trained to do work or perform tasks. Other commenters suggested that the Department should identify excluded animals, such as birds and llamas, in the final rule. Although one commenter noted that wild animals bred in captivity should be permitted to be service animals, the Department has decided to make clear that all wild animals, whether born or bred in captivity or in the wild, are eliminated from coverage as service animals. The Department believes that this approach reduces risks to health or safety attendant with wild animals. Some animals, such as certain nonhuman primates including certain monkeys, pose a direct threat; their behavior can be unpredictably aggressive and violent without notice or provocation. The American Veterinary Medical Association (AVMA) issued a position statement advising against the use of monkeys as service animals, stating that “[t]he AVMA does not support the use of nonhuman primates as assistance animals because of animal welfare concerns, and the potential

for serious injury and zoonotic [animal to human disease transmission] risks." AVMA Position Statement, *Nonhuman Primates as Assistance Animals*, (2005) available at [http://www.avma.org/issues/policy/nonhuman\\_primates.asp](http://www.avma.org/issues/policy/nonhuman_primates.asp) (last visited June 24, 2010).

An organization that trains capuchin monkeys to provide in-home services to individuals with paraplegia and quadriplegia was in substantial agreement with the AVMA's views but requested a limited recognition in the service animal definition for the capuchin monkeys it trains to provide assistance for persons with disabilities. The organization commented that its trained capuchin monkeys undergo scrupulous veterinary examinations to ensure that the animals pose no health risks, and are used by individuals with disabilities exclusively in their homes. The organization acknowledged that the capuchin monkeys it trains are not necessarily suitable for use in State or local government facilities. The organization noted that several State and local government entities have local zoning, licensing, health, and safety laws that prohibit nonhuman primates, and that these prohibitions would prevent individuals with disabilities from using these animals even in their homes.

The organization argued that including capuchin monkeys under the service animal umbrella would make it easier for individuals with disabilities to obtain reasonable modifications of State and local licensing, health, and safety laws that would permit the use of these monkeys. The organization argued that this limited modification to the service animal definition was warranted in view of the services these monkeys perform, which enable many individuals with paraplegia and quadriplegia to live and function with increased independence.

The Department has carefully considered the potential risks associated with the use of nonhuman primates as service animals in State and local government facilities, as well as the information provided to the Department about the significant benefits that trained capuchin monkeys provide to certain individuals with disabilities in residential settings. The Department has determined, however, that nonhuman primates, including capuchin monkeys, will not be recognized as service animals for purposes of this rule because of their potential for disease transmission and unpredictable aggressive behavior. The Department believes that these characteristics make nonhuman primates unsuitable for use as service animals in the context of the wide variety of public settings subject to this rule. As the organization advocating the inclusion of capuchin monkeys acknowledges, capuchin monkeys are not suitable for use in public facilities.

The Department emphasizes that it has decided only that capuchin monkeys will not be included in the definition of service animals for purposes of its regulation implementing the ADA. This decision does not have any effect on the extent to which public entities are required to allow the use of such monkeys under other Federal statutes. For example, under the FHA, an individual with a disability may have the right to have an animal other than a dog in his or her home if the animal qualifies as a "reasonable accommodation" that is necessary to afford the individual equal opportunity to use and enjoy a dwelling, assuming that the use of the animal does not pose a direct threat. In some cases, the right of an individual to have an animal under the FHA may conflict with State or local laws that prohibit all individuals, with or without disabilities, from owning a particular species. However, in this circumstance, an individual who wishes to request a reasonable modification of the State or local law must do so under the FHA, not the ADA.

Having considered all of the comments about which species should qualify as service animals under the ADA, the Department has determined the most reasonable approach is to limit acceptable species to dogs.

**Size or weight limitations.** The vast majority of commenters did not support a size or weight limitation.

Commenters were typically opposed to a size or weight limit because many tasks performed by service animals require large, strong dogs. For instance, service animals may perform tasks such as providing balance and support or pulling a wheelchair. Small animals may not be suitable for large adults. The weight of the service animal user is often correlated with the size and weight of the service animal. Others were concerned that adding a size and weight limit would further complicate the difficult process of finding an appropriate service animal. One commenter noted that there is no need for a limit because "if, as a practical matter, the size or weight of an individual's service animal creates a direct threat or fundamental alteration to a particular public entity or accommodation, there are provisions that allow for the animal's exclusion or removal." Some common concerns among commenters in support of a size and weight limit were that a larger animal may be less able to fit in various areas with its handler, such as toilet rooms and public seating areas, and that larger animals are more difficult to control.

Balancing concerns expressed in favor of and against size and weight limitations, the Department has determined that such limitations would not be appropriate. Many individuals of larger stature require larger dogs. The Department believes it would be inappropriate to deprive these individuals of the option of using a service dog of the size required to provide the physical support and stability these individuals may need to function independently. Since large dogs have always served as service animals, continuing their use should not constitute fundamental alterations or impose undue burdens on title II entities.

**Breed limitations.** A few commenters suggested that certain breeds of dogs should not be allowed to be used as service animals. Some suggested that the Department should defer to local laws restricting the breeds of dogs that individuals who reside in a community may own. Other commenters opposed breed restrictions, stating that the breed of a dog does not determine its propensity for aggression and that aggressive and non-aggressive dogs exist in all breeds.

The Department does not believe that it is either appropriate or consistent with the ADA to defer to local laws that prohibit certain breeds of dogs based on local concerns that these breeds may have a history of unprovoked aggression or attacks. Such deference would have the effect of limiting the rights of persons with disabilities under the ADA who use certain service animals based on where they live rather than on whether the use of a particular animal poses a direct threat to the health and safety of others. Breed restrictions differ significantly from jurisdiction to jurisdiction. Some jurisdictions have no breed restrictions. Others have restrictions that, while well-meaning, have the unintended effect of screening out the very breeds of dogs that have successfully served as service animals for decades without a history of the type of unprovoked aggression or attacks that would pose a direct threat, e.g., German Shepherds. Other jurisdictions prohibit animals over a certain weight, thereby restricting breeds without invoking an express breed ban. In addition, deference to breed restrictions contained in local laws would have the unacceptable consequence of restricting travel by an individual with a disability who uses a breed that is acceptable and poses no safety hazards in the individual's home jurisdiction but is nonetheless banned by other jurisdictions. State and local government entities have the ability to determine, on a case-by-case basis, whether a particular service animal can be excluded based on that particular animal's actual behavior or history—not based on fears or generalizations about how an animal or breed might behave. This ability to exclude an animal whose behavior or history evidences a direct threat is sufficient to protect health and safety.

*Recognition of psychiatric service animals but not "emotional support animals."* The definition of "service animal" in the NPRM stated the Department's longstanding position that emotional support animals are not included in the definition of "service animal." The proposed text in § 35.104 provided that "[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits or to promote emotional well-being are not service animals." 73 FR 34466, 34504 (June 17, 2008).

Many advocacy organizations expressed concern and disagreed with the exclusion of comfort and emotional support animals. Others have been more specific, stating that individuals with disabilities may need their emotional support animals in order to have equal access. Some commenters noted that individuals with disabilities use animals that have not been trained to perform tasks directly related to their disability. These animals do not qualify as service animals under the ADA. These are emotional support or comfort animals.

Commenters asserted that excluding categories such as "comfort" and "emotional support" animals recognized by laws such as the FHAct or the Air Carrier Access Act (ACAA) is confusing and burdensome. Other commenters noted that emotional support and comfort animals perform an important function, asserting that animal companionship helps individuals who experience depression resulting from multiple sclerosis.

Some commenters explained the benefits emotional support animals provide, including emotional support, comfort, therapy, companionship, therapeutic benefits, and the promotion of emotional well-being. They contended that without the presence of an emotional support animal in their lives they would be disadvantaged and unable to participate in society. These commenters were concerned that excluding this category of animals will lead to discrimination against, and the excessive questioning of, individuals with non-visible or non-apparent disabilities. Other commenters expressing opposition to the exclusion of individually trained "comfort" or "emotional support" animals asserted that the ability to soothe or de-escalate and control emotion is "work" that benefits the individual with the disability.

Many commenters requested that the Department carve out an exception that permits current or former members of the military to use emotional support animals. They asserted that a significant number of service members returning from active combat duty have adjustment difficulties due to combat, sexual assault, or other traumatic experiences while on active duty. Commenters noted that some current or former members of the military service have been prescribed animals for conditions such as PTSD. One commenter stated that service women who were sexually assaulted while in the military use emotional support animals to help them feel safe enough to step outside their homes. The Department recognizes that many current and former members of the military have disabilities as a result of service-related injuries that may require emotional support and that such individuals can benefit from the use of an emotional support animal and could use such animal in their home under the FHAct. However, having carefully weighed the issues, the Department believes that its final rule appropriately addresses the balance of issues and concerns of both the individual with a disability and the public entity. The Department also notes that nothing in this part prohibits a public entity from allowing current or former military members or anyone else with disabilities to utilize emotional support animals if it wants to do so.

Commenters asserted the view that if an animal's "mere presence" legitimately provides such benefits to an individual with a disability and if those benefits are necessary to provide equal opportunity given the facts of the particular disability, then such an animal should qualify as a "service animal." Commenters noted that the focus should be on the nature of a person's disability, the difficulties the disability may impose and whether the requested accommodation would legitimately address those difficulties, not on evaluating the animal involved. The Department understands this approach has benefitted many

individuals under the FHAct and analogous State law provisions, where the presence of animals poses fewer health and safety issues, and where emotional support animals provide assistance that is unique to residential settings. The Department believes, however, that the presence of such animals is not required in the context of title II entities such as courthouses, State and local government administrative buildings, and similar title II facilities.

Under the Department's previous regulatory framework, some individuals and entities assumed that the requirement that service animals must be individually trained to do work or perform tasks excluded all individuals with mental disabilities from having service animals. Others assumed that any person with a psychiatric condition whose pet provided comfort to them was covered by the 1991 title II regulation. The Department reiterates that psychiatric service animals that are trained to do work or perform a task for individuals whose disability is covered by the ADA are protected by the Department's present regulatory approach. Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding individuals to take medicine, providing safety checks or room searches for individuals with PTSD, interrupting self-mutilation, and removing disoriented individuals from dangerous situations.

The difference between an emotional support animal and a psychiatric service animal is the work or tasks that the animal performs. Traditionally, service dogs worked as guides for individuals who were blind or had low vision. Since the original regulation was promulgated, service animals have been trained to assist individuals with many different types of disabilities.

In the final rule, the Department has retained its position on the exclusion of emotional support animals from the definition of "service animal." The definition states that "[t]he provision of emotional support, well-being, comfort, or companionship, \*\*\* do[es] not constitute work or tasks for the purposes of this definition." The Department notes, however, that the exclusion of emotional support animals from coverage in the final rule does not mean that individuals with psychiatric or mental disabilities cannot use service animals that meet the regulatory definition. The final rule defines service animal as follows: "[s]ervice animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." This language simply clarifies the Department's longstanding position.

The Department's position is based on the fact that the title II and title III regulations govern a wider range of public settings than the housing and transportation settings for which the Department of Housing and Urban Development (HUD) and DOT regulations allow emotional support animals or comfort animals. The Department recognizes that there are situations not governed by the title II and title III regulations, particularly in the context of residential settings and transportation, where there may be a legal obligation to permit the use of animals that do not qualify as service animals under the ADA, but whose presence nonetheless provides necessary emotional support to persons with disabilities. Accordingly, other Federal agency regulations, case law, and possibly State or local laws governing those situations may provide appropriately for increased access for animals other than service animals as defined under the ADA. Public officials, housing providers, and others who make decisions relating to animals in residential and transportation settings should consult the Federal, State, and local laws that apply in those areas (e.g., the FHAct regulations of HUD and the ACAA) and not rely on the ADA as a basis for reducing those obligations.

***Retain term "service animal."*** Some commenters asserted that the term "assistance animal" is a term of art and should replace the term "service animal." However, the majority of commenters preferred the term "service animal" because it is more specific. The Department has decided to retain the term "service

animal" in the final rule. While some agencies, like HUD, use the term "assistance animal," "assistive animal," or "support animal," these terms are used to denote a broader category of animals than is covered by the ADA. The Department has decided that changing the term used in the final rule would create confusion, particularly in view of the broader parameters for coverage under the FHAct, cf., preamble to HUD's Final Rule for Pet Ownership for the Elderly and Persons with Disabilities, 73 FR 63834-38 (Oct. 27, 2008); HUD Handbook No. 4350.3 Rev-1, Chapter 2, Occupancy Requirements of Subsidized Multifamily Housing Programs (June 2007), available at <http://www.hud.gov/offices/adm/hudclips/handbooks/hsgch/4350.3> (last visited June 24, 2010). Moreover, as discussed above, the Department's definition of "service animal" in the title II final rule does not affect the rights of individuals with disabilities who use assistance animals in their homes under the FHAct or who use "emotional support animals" that are covered under the ACAA and its implementing regulations. See 14 CFR 382.7 et seq.; see also Department of Transportation, *Guidance Concerning Service Animals in Air Transportation*, 68 FR 24874, 24877 (May 9, 2003) (discussing accommodation of service animals and emotional support animals on aircraft).

## "Video Remote Interpreting" (VRI) Services

In the NPRM, the Department proposed adding Video Interpreting Services (VIS) to the list of auxiliary aids available to provide effective communication described in § 35.104. In the preamble to the NPRM, VIS was defined as "a technology composed of a video phone, video monitors, cameras, a high-speed Internet connection, and an interpreter. The video phone provides video transmission to a video monitor that permits the individual who is deaf or hard of hearing to view and sign to a video interpreter (i.e., a live interpreter in another location), who can see and sign to the individual through a camera located on or near the monitor, while others can communicate by speaking. The video monitor can display a split screen of two live images, with the interpreter in one image and the individual who is deaf or hard of hearing in the other image." 73 FR 34446, 34479 (June 17, 2008). Comments from advocacy organizations and individuals unanimously requested that the Department use the term "video remote interpreting (VRI)," instead of VIS, for consistency with Federal Communications Commission (FCC) regulations. See FCC Public Notice, DA-0502417 (Sept. 7, 2005), and with common usage by consumers. The Department has made that change throughout the regulation to avoid confusion and to make the regulation more consistent with existing regulations.

Many commenters also requested that the Department distinguish between VRI and "video relay service (VRS)." Both VRI and VRS use a remote interpreter who is able to see and communicate with a deaf person and a hearing person, and all three individuals may be connected by a video link. VRI is a fee-based interpreting service conveyed via videoconferencing where at least one person, typically the interpreter, is at a separate location. VRI can be provided as an on-demand service or by appointment. VRI normally involves a contract in advance for the interpreter who is usually paid by the covered entity.

VRS is a telephone service that enables persons with disabilities to use the telephone to communicate using video connections and is a more advanced form of relay service than the traditional voice to text telephones (TTY) relay systems that were recognized in the 1991 title II regulation. More specifically, VRS is a video relay service using interpreters connected to callers by video hook-up and is designed to provide telephone services to persons who are deaf and use American Sign Language that are functionally equivalent to those provided to users who are hearing. VRS is funded through the Interstate Telecommunications Relay Services Fund and overseen by the FCC. See 47 CFR 64.601(a)(26). There are no fees for callers to use the VRS interpreters and the video connection, although there may be relatively inexpensive initial costs to the title II entities to purchase the videophone or camera for on-line video

connection, or other equipment to connect to the VRS service. The FCC has made clear that VRS functions as a telephone service and is not intended to be used for interpreting services where both parties are in the same room; the latter is reserved for VRI. The Department agrees that VRS cannot be used as a substitute for in-person interpreters or for VRI in situations that would not, absent one party's disability, entail use of the telephone.

Many commenters strongly recommended limiting the use of VRI to circumstances where it will provide effective communication. Commenters from advocacy groups and persons with disabilities expressed concern that VRI may not always be appropriate to provide effective communication, especially in hospitals and emergency rooms. Examples were provided of patients who are unable to see the video monitor because they are semi-conscious or unable to focus on the video screen; other examples were given of cases where the video monitor is out of the sightline of the patient or the image is out of focus; still other examples were given of patients who could not see the image because the signal was interrupted, causing unnatural pauses in the communication, or the image was grainy or otherwise unclear. Many commenters requested more explicit guidelines on the use of VRI, and some recommended requirements for equipment maintenance, high-speed, wide-bandwidth video links using dedicated lines or wireless systems, and training of staff using VRI, especially in hospital and health care situations. Several major organizations requested a requirement to include the interpreter's face, head, arms, hands, and eyes in all transmissions. Finally, one State agency asked for additional guidance, outreach, and mandated advertising about the availability of VRI in title II situations so that local government entities would budget for and facilitate the use of VRI in libraries, schools, and other places.

After consideration of the comments and the Department's own research and experience, the Department has determined that VRI can be an effective method of providing interpreting services in certain circumstances, but not in others. For example, VRI should be effective in many situations involving routine medical care, as well as in the emergency room where urgent care is important, but no in-person interpreter is available; however, VRI may not be effective in situations involving surgery or other medical procedures where the patient is limited in his or her ability to see the video screen. Similarly, VRI may not be effective in situations where there are multiple people in a room and the information exchanged is highly complex and fast-paced. The Department recognizes that in these and other situations, such as where communication is needed for persons who are deaf-blind, it may be necessary to summon an in-person interpreter to assist certain individuals. To ensure that VRI is effective in situations where it is appropriate, the Department has established performance standards in § 35.160(d).

## Subpart B—General Requirements

### Section 35.130(h) Safety.

Section 36.301(b) of the 1991 title III regulation provides that a public accommodation "may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks, and not on mere speculation, stereotypes, or generalizations about individuals with disabilities." 28 CFR 36.301(b). Although the 1991 title II regulation did not include similar language, the Department's 1993 ADA Title II Technical Assistance Manual at II-3.5200 makes clear the Department's view that public entities also have the right to impose legitimate safety requirements necessary for the safe operation of services, programs, or activities. To ensure consistency between the title II and title III regulations, the Department has added a new § 35.130(h) in the final rule incorporating this longstanding position relating to imposition of legitimate safety requirements.

## Section 35.133 Maintenance of accessible features.

Section 35.133 in the 1991 title II regulation provides that a public entity must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by qualified individuals with disabilities. See 28 CFR 35.133(a). In the NPRM, the Department clarified the application of this provision and proposed one change to the section to address the discrete situation in which the scoping requirements provided in the 2010 Standards reduce the number of required elements below the requirements of the 1991 Standards. In that discrete event, a public entity may reduce such accessible features in accordance with the requirements in the 2010 Standards.

The Department received only four comments on this proposed amendment. None of the commenters opposed the change. In the final rule, the Department has revised the section to make it clear that if the 2010 Standards reduce either the technical requirements or the number of required accessible elements below that required by the 1991 Standards, then the public entity may reduce the technical requirements or the number of accessible elements in a covered facility in accordance with the requirements of the 2010 Standards.

One commenter urged the Department to amend § 35.133(b) to expand the language of the section to restocking of shelves as a permissible activity for isolated or temporary interruptions in service or access. It is the Department's position that a temporary interruption that blocks an accessible route, such as restocking of shelves, is already permitted by § 35.133(b), which clarifies that "isolated or temporary interruptions in service or access due to maintenance or repairs" are permitted. Therefore, the Department will not make any additional changes in the final rule to the language of § 35.133(b) other than those discussed in the preceding paragraph.

## Section 35.136 Service animals.

The 1991 title II regulation states that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity." 28 CFR 130(b)(7). Unlike the title III regulation, the 1991 title II regulation did not contain a specific provision addressing service animals.

In the NPRM, the Department stated the intention of providing the broadest feasible access to individuals with disabilities and their service animals, unless a public entity can demonstrate that making the modifications to policies excluding animals would fundamentally alter the nature of the public entity's service, program, or activity. The Department proposed creating a new § 35.136 addressing service animals that was intended to retain the scope of the 1991 title III regulation at § 36.302(c), while clarifying the Department's longstanding policies and interpretations, as outlined in published technical assistance, *Commonly Asked Questions About Service Animals in Places of Business* (1996), available at <http://www.ada.gov/qasrvf.htm> and *ADA Guide for Small Businesses* (1999), available at <http://www.ada.gov/smbustxt.htm>, and to add that a public entity may exclude a service animal in certain circumstances where the service animal fails to meet certain behavioral standards. The Department received extensive comments in response to proposed § 35.136 from individuals, disability advocacy groups, organizations involved in training service animals, and public entities. Those comments and the Department's response are discussed below.

**Exclusion of service animals.** In the NPRM, the Department proposed incorporating the title III regulatory language of § 36.302(c) into new § 35.136(a), which states that “[g]enerally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability, unless the public entity can demonstrate that the use of a service animal would fundamentally alter the public entity's service, program, or activity.” The final rule retains this language with some modifications.

In addition, in the NPRM, the Department proposed clarifying those circumstances where otherwise eligible service animals may be excluded by public entities from their programs or facilities. The Department proposed in § 35.136(b)(1) of the NPRM that a public entity may ask an individual with a disability to remove a service animal from a title II service, program, or activity if: “[t]he animal is out of control and the animal's handler does not take effective action to control it.” 73 FR 34466, 34504 (June 17, 2008).

The Department has long held that a service animal must be under the control of the handler at all times. Commenters overwhelmingly were in favor of this language, but noted that there are occasions when service animals are provoked to disruptive or aggressive behavior by agitators or troublemakers, as in the case of a blind individual whose service dog is taunted or pinched. While all service animals are trained to ignore and overcome these types of incidents, misbehavior in response to provocation is not always unreasonable. In circumstances where a service animal misbehaves or responds reasonably to a provocation or injury, the public entity must give the handler a reasonable opportunity to gain control of the animal. Further, if the individual with a disability asserts that the animal was provoked or injured, or if the public entity otherwise has reason to suspect that provocation or injury has occurred, the public entity should seek to determine the facts and, if provocation or injury occurred, the public entity should take effective steps to prevent further provocation or injury, which may include asking the provocateur to leave the public entity. This language is unchanged in the final rule.

The NPRM also proposed language at § 35.136(b)(2) to permit a public entity to exclude a service animal if the animal is not housebroken (*i.e.*, trained so that, absent illness or accident, the animal controls its waste elimination) or the animal's presence or behavior fundamentally alters the nature of the service the public entity provides (*e.g.*, repeated barking during a live performance). Several commenters were supportive of this NPRM language, but cautioned against overreaction by the public entity in these instances. One commenter noted that animals get sick, too, and that accidents occasionally happen. In these circumstances, simple clean up typically addresses the incident. Commenters noted that the public entity must be careful when it excludes a service animal on the basis of “fundamental alteration,” asserting for example that a public entity should not exclude a service animal for barking in an environment where other types of noise, such as loud cheering or a child crying, is tolerated. The Department maintains that the appropriateness of an exclusion can be assessed by reviewing how a public entity addresses comparable situations that do not involve a service animal. The Department has retained in § 35.136(b) of the final rule the exception requiring animals to be housebroken. The Department has not retained the specific NPRM language stating that animals can be excluded if their presence or behavior fundamentally alters the nature of the service provided by the public entity, because the Department believes that this exception is covered by the general reasonable modification requirement contained in § 35.130(b)(7).

The NPRM also proposed at § 35.136(b)(3) that a service animal can be excluded where “[t]he animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications.” 73 FR 34466, 34504 (June 17, 2008). Commenters were universally supportive of this provision as it makes express the discretion of a public entity to exclude a service animal that poses a direct threat. Several commenters cautioned against the overuse of this provision and suggested that the Department provide an example of the rule's application. The Department has decided not to include

regulatory language specifically stating that a service animal can be excluded if it poses a direct threat. The Department believes that the addition of new § 35.139, which incorporates the language of the title III provisions at § 36.302 relating to the general defense of direct threat, is sufficient to establish the availability of this defense to public entities.

*Access to a public entity following the proper exclusion of a service animal.* The NPRM proposed that in the event a public entity properly excludes a service animal, the public entity must give the individual with a disability the opportunity to access the programs, services, and facilities of the public entity without the service animal. Most commenters welcomed this provision as a common sense approach. These commenters noted that they do not wish to preclude individuals with disabilities from the full and equal enjoyment of the State or local government's programs, services, or facilities, simply because of an isolated problem with a service animal. The Department has elected to retain this provision in § 35.136(a).

*Other requirements.* The NPRM also proposed that the regulation include the following requirements: that the work or tasks performed by the service animal must be directly related to the handler's disability; that a service animal must be individually trained to do work or perform a task, be housebroken, and be under the control of the handler; and that a service animal must have a harness, leash, or other tether. Most commenters addressed at least one of these issues in their responses. Most agreed that these provisions are important to clarify further the 1991 service animal regulation. The Department has moved the requirement that the work or tasks performed by the service animal must be related directly to the individual's disability to the definition of 'service animal' in § 35.104. In addition, the Department has modified the proposed language in § 35.136(d) relating to the handler's control of the animal with a harness, leash, or other tether to state that "[a] service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means)." The Department has retained the requirement that the service animal must be individually trained (see Appendix A discussion of § 35.104, definition of "service animal"), as well as the requirement that the service animal be housebroken.

*Responsibility for supervision and care of a service animal.* The NPRM proposed language at § 35.136(e) stating that "[a] public entity is not responsible for caring for or supervising a service animal." 73 FR 34466, 34504 (June 17, 2008). Most commenters did not address this particular provision. The Department recognizes that there are occasions when a person with a disability is confined to bed in a hospital for a period of time. In such an instance, the individual may not be able to walk or feed the service animal. In such cases, if the individual has a family member, friend, or other person willing to take on these responsibilities in the place of the individual with disabilities, the individual's obligation to be responsible for the care and supervision of the service animal would be satisfied. The language of this section is retained, with minor modifications, in § 35.136(e) of the final rule.

*Inquiries about service animals.* The NPRM proposed language at § 35.136(f) setting forth parameters about how a public entity may determine whether an animal qualifies as a service animal. The proposed section stated that a public entity may ask if the animal is required because of a disability and what task or work the animal has been trained to do but may not require proof of service animal certification or licensing. Such inquiries are limited to eliciting the information necessary to make a decision without requiring disclosure of confidential disability-related information that a State or local government entity does not

need. This language is consistent with the policy guidance outlined in two Department publications, *Commonly Asked Questions about Service Animals in Places of Business* (1996), available at <http://www.ada.gov/qasrvc.htm>, and *ADA Guide for Small Businesses*, (1999), available at <http://www.ada.gov/smbustxt.htm>.

Although some commenters contended that the NPRM service animal provisions leave unaddressed the issue of how a public entity can distinguish between a psychiatric service animal, which is covered under the final rule, and a comfort animal, which is not, other commenters noted that the Department's published guidance has helped public entities to distinguish between service animals and pets on the basis of an individual's response to these questions. Accordingly, the Department has retained the NPRM language incorporating its guidance concerning the permissible questions into the final rule.

Some commenters suggested that a title II entity be allowed to require current documentation, no more than one year old, on letterhead from a mental health professional stating the following: (1) That the individual seeking to use the animal has a mental health-related disability; (2) that having the animal accompany the individual is necessary to the individual's mental health or treatment or to assist the person otherwise; and (3) that the person providing the assessment of the individual is a licensed mental health professional and the individual seeking to use the animal is under that individual's professional care. These commenters asserted that this will prevent abuse and ensure that individuals with legitimate needs for psychiatric service animals may use them. The Department believes that this proposal would treat persons with psychiatric, intellectual, and other mental disabilities less favorably than persons with physical or sensory disabilities. The proposal would also require persons with disabilities to obtain medical documentation and carry it with them any time they seek to engage in ordinary activities of daily life in their communities—something individuals without disabilities have not been required to do.

Accordingly, the Department has concluded that a documentation requirement of this kind would be unnecessary, burdensome, and contrary to the spirit, intent, and mandates of the ADA.

*Areas of a public entity open to the public, participants in services, programs, or activities, or invitees.* The NPRM proposed at § 35.136(g) that an individual with a disability who uses a service animal has the same right of access to areas of a title II entity as members of the public, participants in services, programs, or activities, or invitees. Commenters indicated that allowing individuals with disabilities to go with their service animals into the same areas as members of the public, participants in programs, services, or activities, or invitees is accepted practice by most State and local government entities. The Department has included a slightly modified version of this provision in § 35.136(g) of the final rule.

The Department notes that under the final rule, a healthcare facility must also permit a person with a disability to be accompanied by a service animal in all areas of the facility in which that person would otherwise be allowed. There are some exceptions, however. The Department follows the guidance of the Centers for Disease Control and Prevention (CDC) on the use of service animals in a hospital setting. Zoonotic diseases can be transmitted to humans through bites, scratches, direct contact, arthropod vectors, or aerosols.

Consistent with CDC guidance, it is generally appropriate to exclude a service animal from limited-access areas that employ general infection-control measures, such as operating rooms and burn units. See Centers for Disease Control and Prevention, *Guidelines for Environmental Infection Control in Health-Care Facilities: Recommendations of CDC and the Healthcare Infection Control Practices Advisory Committee* (June 2003), available at [http://www.cdc.gov/hicpac/pdf/guidelines/eic\\_in\\_HCF\\_03.pdf](http://www.cdc.gov/hicpac/pdf/guidelines/eic_in_HCF_03.pdf) (last visited June 24, 2010). A service animal may accompany its handler to such areas as admissions and discharge

offices, the emergency room, inpatient and outpatient rooms, examining and diagnostic rooms, clinics, rehabilitation therapy areas, the cafeteria and vending areas, the pharmacy, restrooms, and all other areas of the facility where healthcare personnel, patients, and visitors are permitted without added precaution.

***Prohibition against surcharges for use of a service animal.*** In the NPRM, the Department proposed to incorporate the previously mentioned policy guidance, which prohibits the assessment of a surcharge for the use of a service animal, into proposed § 35.136(h). Several commenters agreed that this provision makes clear the obligation of a public entity to admit an individual with a service animal without surcharges, and that any additional costs imposed should be factored into the overall cost of administering a program, service, or activity, and passed on as a charge to all participants, rather than an individualized surcharge to the service animal user. Commenters also noted that service animal users cannot be required to comply with other requirements that are not generally applicable to other persons. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal. The Department has retained this language, with minor modifications, in the final rule at § 35.136(h).

***Training requirement.*** Certain commenters recommended the adoption of formal training requirements for service animals. The Department has rejected this approach and will not impose any type of formal training requirements or certification process, but will continue to require that service animals be individually trained to do work or perform tasks for the benefit of an individual with a disability. While some groups have urged the Department to modify this position, the Department has determined that such a modification would not serve the full array of individuals with disabilities who use service animals, since individuals with disabilities may be capable of training, and some have trained, their service animal to perform tasks or do work to accommodate their disability. A training and certification requirement would increase the expense of acquiring a service animal and might limit access to service animals for individuals with limited financial resources.

Some commenters proposed specific behavior or training standards for service animals, arguing that without such standards, the public has no way to differentiate between untrained pets and service animals. Many of the suggested behavior or training standards were lengthy and detailed. The Department believes that this rule addresses service animal behavior sufficiently by including provisions that address the obligations of the service animal user and the circumstances under which a service animal may be excluded, such as the requirements that an animal be housebroken and under the control of its handler.

***Miniature horses.*** The Department has been persuaded by commenters and the available research to include a provision that would require public entities to make reasonable modifications to policies, practices, or procedures to permit the use of a miniature horse by a person with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. The traditional service animal is a dog, which has a long history of guiding individuals who are blind or have low vision, and over time dogs have been trained to perform an even wider variety of services for individuals with all types of disabilities. However, an organization that developed a program to train miniature horses, modeled on the program used for guide dogs, began training miniature horses in 1991.

Although commenters generally supported the species limitations proposed in the NPRM, some were opposed to the exclusion of miniature horses from the definition of a service animal. These commenters noted that these animals have been providing assistance to persons with disabilities for many years. Miniature horses were suggested by some commenters as viable alternatives to dogs for individuals with allergies, or for those whose religious beliefs preclude the use of dogs. Another consideration mentioned in favor of the use of miniature horses is the longer life span and strength of miniature horses in

comparison to dogs. Specifically, miniature horses can provide service for more than 25 years while dogs can provide service for approximately 7 years, and, because of their strength, miniature horses can provide services that dogs cannot provide. Accordingly, use of miniature horses reduces the cost involved to retire, replace, and train replacement service animals.

The miniature horse is not one specific breed, but may be one of several breeds, with distinct characteristics that produce animals suited to service animal work. The animals generally range in height from 24 inches to 34 inches measured to the withers, or shoulders, and generally weigh between 70 and 100 pounds. These characteristics are similar to those of large breed dogs such as Labrador Retrievers, Great Danes, and Mastiffs. Similar to dogs, miniature horses can be trained through behavioral reinforcement to be "housebroken." Most miniature service horse handlers and organizations recommend that when the animals are not doing work or performing tasks, the miniature horses should be kept outside in a designated area, instead of indoors in a house.

According to information provided by an organization that trains service horses, these miniature horses are trained to provide a wide array of services to their handlers, primarily guiding individuals who are blind or have low vision, pulling wheelchairs, providing stability and balance for individuals with disabilities that impair the ability to walk, and supplying leverage that enables a person with a mobility disability to get up after a fall. According to the commenter, miniature horses are particularly effective for large stature individuals. The animals can be trained to stand (and in some cases, lie down) at the handler's feet in venues where space is at a premium, such as assembly areas or inside some vehicles that provide public transportation. Some individuals with disabilities have traveled by train and have flown commercially with their miniature horses.

The miniature horse is not included in the definition of service animal, which is limited to dogs. However, the Department has added a specific provision at § 35.136(i) of the final rule covering miniature horses. Under this provision, a public entity must make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. The public entity may take into account a series of assessment factors in determining whether to allow a miniature horse into a specific facility. These include the type, size, and weight of the miniature horse; whether the handler has sufficient control of the miniature horse; whether the miniature horse is housebroken; and whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation. In addition, paragraphs (c)-(h) of this section, which are applicable to dogs, also apply to miniature horses.

Ponies and full-size horses are not covered by § 35.136(i). Also, because miniature horses can vary in size and can be larger and less flexible than dogs, covered entities may exclude this type of service animal if the presence of the miniature horse, because of its larger size and lower level of flexibility, results in a fundamental alteration to the nature of the programs activities, or services provided.

## Section 35.137 Mobility devices.

Section 35.137 of the NPRM clarified the scope and circumstances under which covered entities are legally obligated to accommodate various "mobility devices." Section 35.137 set forth specific requirements for the accommodation of "mobility devices," including wheelchairs, manually-powered mobility aids, and other power-driven mobility devices.

In both the NPRM and the final rule, § 35.137(a) states the general rule that in any areas open to pedestrians, public entities shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, including walkers, crutches, canes, braces, or similar devices. Because mobility scooters satisfy the definition of “wheelchair” (i.e., “manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor, or of both indoor and outdoor locomotion”), the reference to them in § 35.137(a) of the final rule has been omitted to avoid redundancy.

Some commenters expressed concern that permitting the use of other power-driven mobility devices by individuals with mobility disabilities would make such devices akin to wheelchairs and would require them to make physical changes to their facilities to accommodate their use. This concern is misplaced. If a facility complies with the applicable design requirements in the 1991 Standards or the 2010 Standards, the public entity will not be required to exceed those standards to accommodate the use of wheelchairs or other power-driven mobility devices that exceed those requirements.

*Legal standard for other power-driven mobility devices.* The NPRM version of § 35.137(b) provided that “[a] public entity shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public entity can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration in the public entity's service, program, or activity.” 73 FR 34466, 34505 (June 17, 2008). In other words, public entities are by default required to permit the use of other power-driven mobility devices; the burden is on them to prove the existence of a valid exception.

Most commenters supported the notion of assessing whether the use of a particular device is reasonable in the context of a particular venue. Commenters, however, disagreed about the meaning of the word “reasonable” as it is used in § 35.137(b) of the NPRM. Advocacy and nonprofit groups almost universally objected to the use of a general reasonableness standard with regard to the assessment of whether a particular device should be allowed at a particular venue. They argued that the assessment should be based on whether reasonable modifications could be made to allow a particular device at a particular venue, and that the only factors that should be part of the calculus that results in the exclusion of a particular device are undue burden, direct threat, and fundamental alteration.

A few commenters opposed the proposed provision requiring public entities to assess whether reasonable modifications can be made to allow other power-driven mobility devices, preferring instead that the Department issue guidance materials so that public entities would not have to incur the cost of such analyses. Another commenter noted a “fox guarding the hen house”-type of concern with regard to public entities developing and enforcing their own modification policy.

In response to comments received, the Department has revised § 35.137(b) to provide greater clarity regarding the development of legitimate safety requirements regarding other power-driven mobility devices and has added a new § 35.130(h) (Safety) to the title II regulation which specifically permits public entities to impose legitimate safety requirements necessary for the safe operation of their services, programs, and activities. (See discussion below.) The Department has not retained the proposed NPRM language stating that an other power-driven mobility device can be excluded if a public entity can demonstrate that its use is unreasonable or will result in a fundamental alteration of the entity's service, program, or activity, because the Department believes that this exception is covered by the general reasonable modification requirement contained in § 35.130(b)(7).

**Assessment factors.** Section 35.137(c) of the NPRM required public entities to "establish policies to permit the use of other power-driven mobility devices" and articulated four factors upon which public entities must base decisions as to whether a modification is reasonable to allow the use of a class of other power-driven mobility devices by individuals with disabilities in specific venues (e.g., parks, courthouses, office buildings, etc.). 73 FR 34466, 34504 (June 17, 2008).

The Department has relocated and modified the NPRM text that appeared in § 35.137(c) to new paragraph § 35.137(b)(2) to clarify what factors the public entity shall use in determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification. Section 35.137(b)(2) now states that "[i]n determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under (b)(1), a public entity shall consider" certain enumerated factors. The assessment factors are designed to assist public entities in determining whether allowing the use of a particular other power-driven mobility device in a specific facility is reasonable. Thus, the focus of the analysis must be on the appropriateness of the use of the device at a specific facility, rather than whether it is necessary for an individual to use a particular device.

The NPRM proposed the following specific assessment factors: (1) The dimensions, weight, and operating speed of the mobility device in relation to a wheelchair; (2) the potential risk of harm to others by the operation of the mobility device; (3) the risk of harm to the environment or natural or cultural resources or conflict with Federal land management laws and regulations; and (4) the ability of the public entity to stow the mobility device when not in use, if requested by the user.

Factor 1 was designed to help public entities assess whether a particular device was appropriate, given its particular physical features, for a particular location. Virtually all commenters said the physical features of the device affected their view of whether a particular device was appropriate for a particular location. For example, while many commenters supported the use of another power-driven mobility device if the device were a Segway® PT, because of environmental and health concerns they did not offer the same level of support if the device were an off-highway vehicle, all-terrain vehicle (ATV), golf car, or other device with a fuel-powered or combustion engine. Most commenters noted that indicators such as speed, weight, and dimension really were an assessment of the appropriateness of a particular device in specific venues and suggested that factor 1 say this more specifically.

The term "in relation to a wheelchair" in the NPRM's factor 1 apparently created some concern that the same legal standards that apply to wheelchairs would be applied to other power-driven mobility devices. The Department has omitted the term "in relation to a wheelchair" from § 35.137(b)(2)(i) to clarify that if a facility that is in compliance with the applicable provisions of the 1991 Standards or the 2010 Standards grants permission for an other power-driven mobility device to go on-site, it is not required to exceed those standards to accommodate the use of other power-driven mobility devices.

In response to requests that NPRM factor 1 state more specifically that it requires an assessment of an other power-driven mobility device's appropriateness under particular circumstances or in particular venues, the Department has added several factors and more specific language. In addition, although the NPRM made reference to the operation of other power-driven mobility devices in "specific venues," the Department's intent is captured more clearly by referencing "specific facility" in paragraph (b)(2). The Department also notes that while speed is included in factor 1, public entities should not rely solely on a device's top speed when assessing whether the device can be accommodated; instead, public entities should also consider the minimum speeds at which a device can be operated and whether the development of speed limit policies can be established to address concerns regarding the speed of the

device. Finally, since the ability of the public entity to stow the mobility device when not in use is an aspect of its design and operational characteristics, the text proposed as factor 4 in the NPRM has been incorporated in paragraph (b)(2)(iii).

The NPRM's version of factor 2 provided that the "risk of potential harm to others by the operation of the mobility device" is one of the determinants in the assessment of whether other power-driven mobility devices should be excluded from a site. The Department intended this requirement to be consistent with the Department's longstanding interpretation, expressed in § II-3.5200 (Safety) of the 1993 Title II Technical Assistance Manual, which provides that public entities may "impose legitimate safety requirements that are necessary for safe operation." (This language parallels the provision in the title III regulation at § 36.301(b).) However, several commenters indicated that they read this language, particularly the phrase "risk of potential harm," to mean that the Department had adopted a concept of risk analysis different from that which is in the existing standards. The Department did not intend to create a new standard and has changed the language in paragraphs (b)(1) and (b)(2) to clarify the applicable standards, thereby avoiding the introduction of new assessments of risk beyond those necessary for the safe operation of the public entity. In addition, the Department has added a new section, 35.130(h), which incorporates the existing safety standard into the title II regulation.

While all applicable affirmative defenses are available to public entities in the establishment and execution of their policies regarding other power-driven mobility devices, the Department did not explicitly incorporate the direct threat defense into the assessment factors because § 35.130(h) provides public entities the appropriate framework with which to assess whether legitimate safety requirements that may preclude the use of certain other power-driven mobility devices are necessary for the safe operation of the public entities. In order to be legitimate, the safety requirement must be based on actual risks and not mere speculation regarding the device or how it will be operated. Of course, public entities may enforce legitimate safety rules established by the public entity for the operation of other power-driven mobility devices (e.g., reasonable speed restrictions). Finally, NPRM factor 3 concerning environmental resources and conflicts of law has been relocated to § 35.137(b)(2)(v).

As a result of these comments and requests, NPRM factors 1, 2, 3, and 4 have been revised and renumbered within paragraph (b)(2) in the final rule.

Several commenters requested that the Department provide guidance materials or more explicit concepts of which considerations might be appropriate for inclusion in a policy that allows the use of other power-driven mobility devices. A public entity that has determined that reasonable modifications can be made in its policies, practices, or procedures to allow the use of other power-driven mobility devices should develop a policy that clearly states the circumstances under which the use of other power-driven mobility devices by individuals with a mobility disability will be permitted. It also should include clear, concise statements of specific rules governing the operation of such devices. Finally, the public entity should endeavor to provide individuals with disabilities who use other power-driven mobility devices with advanced notice of its policy regarding the use of such devices and what rules apply to the operation of these devices.

For example, the U.S. General Services Administration (GSA) has developed a policy allowing the use of the Segway® PT and other EPAMDs in all Federal buildings under GSA's jurisdiction. See General Services Administration, *Interim Segway® Personal Transporter Policy* (Dec. 3, 2007), available at [http://www.gsa.gov/graphics/pbs/Interim\\_Segway\\_Policy\\_121007.pdf](http://www.gsa.gov/graphics/pbs/Interim_Segway_Policy_121007.pdf) (last visited June 24, 2010). The GSA policy defines the policy's scope of coverage by setting out what devices are and are not covered by the

policy. The policy also sets out requirements for safe operation, such as a speed limit, prohibits the use of EPAMDs on escalators, and provides guidance regarding security screening of these devices and their operators.

A public entity that determines that it can make reasonable modifications to permit the use of an other power-driven mobility device by an individual with a mobility disability might include in its policy the procedure by which claims that the other power-driven mobility device is being used for a mobility disability will be assessed for legitimacy (*i.e.*, a credible assurance that the device is being used for a mobility disability, including a verbal representation by the person with a disability that is not contradicted by observable fact, or the presentation of a disability parking space placard or card, or State-issued proof of disability); the type or classes of other power-driven mobility devices are permitted to be used by individuals with mobility disabilities; the size, weight, and dimensions of the other power-driven mobility devices that are permitted to be used by individuals with mobility disabilities; the speed limit for the other power-driven mobility devices that are permitted to be used by individuals with mobility disabilities; the places, times, or circumstances under which the use of the other power-driven mobility device is or will be restricted or prohibited; safety, pedestrian, and other rules concerning the use of the other power-driven mobility device; whether, and under which circumstances, storage for the other power-driven mobility device will be made available; and how and where individuals with a mobility disability can obtain a copy of the other power-driven mobility device policy.

Public entities also might consider grouping other power-driven mobility devices by type (*e.g.*, EPAMDs, golf cars, gasoline-powered vehicles, and other devices). For example, an amusement park may determine that it is reasonable to allow individuals with disabilities to use EPAMDs in a variety of outdoor programs and activities, but that it would not be reasonable to allow the use of golf cars as mobility devices in similar circumstances. At the same time, the entity may address its concerns about factors such as space limitations by disallowing use of EPAMDs by members of the general public who do not have mobility disabilities.

The Department anticipates that, in many circumstances, public entities will be able to develop policies that will allow the use of other power-driven mobility devices by individuals with mobility disabilities. Consider the following example:

A county courthouse has developed a policy whereby EPAMDs may be operated in the pedestrian areas of the courthouse if the operator of the device agrees not to operate the device faster than pedestrians are walking; to yield to pedestrians; to provide a rack or stand so that the device can stand upright; and to use the device only in courtrooms that are large enough to accommodate such devices. If the individual is selected for jury duty in one of the smaller courtrooms, the county's policy indicates that if it is not possible for the individual with the disability to park the device and walk into the courtroom, the location of the trial will be moved to a larger courtroom.

**Inquiry into the use of other power-driven mobility device.** The NPRM version of § 35.137(d) provided that “[a] public entity may ask a person using a power-driven mobility device if the mobility device is needed due to the person's disability. A public entity shall not ask a person using a mobility device questions about the nature and extent of the person's disability.” 73 FR 34466, 34504 (June 17, 2008).

Many environmental, transit system, and government commenters expressed concern about people feigning mobility disabilities to be able to use other power-driven mobility devices in public entities in which their use is otherwise restricted. These commenters felt that a mere inquiry into whether the device is being used for a mobility disability was an insufficient mechanism by which to detect fraud by other power-driven mobility device users who do not have mobility disabilities. These commenters believed they should be given more latitude to make inquiries of other power-driven mobility device users claiming

a mobility disability than they would be given for wheelchair users. They sought the ability to establish a policy or method by which public entities may assess the legitimacy of the mobility disability. They suggested some form of certification, sticker, or other designation. One commenter suggested a requirement that a sticker bearing the international symbol for accessibility be placed on the device or that some other identification be required to signal that the use of the device is for a mobility disability. Other suggestions included displaying a disability parking placard on the device or issuing EPAMDs, like the Segway® PT, a permit that would be similar to permits associated with parking spaces reserved for those with disabilities.

Advocacy, nonprofit, and several individual commenters balked at the notion of allowing any inquiry beyond whether the device is necessary for a mobility disability and encouraged the Department to retain the NPRM's language on this topic. Other commenters, however, were empathetic with commenters who had concerns about fraud. At least one Segway® PT advocate suggested it would be permissible to seek documentation of the mobility disability in the form of a simple sign or permit.

The Department has sought to find common ground by balancing the needs of public entities and individuals with mobility disabilities wishing to use other power-driven mobility devices with the Department's longstanding, well-established policy of not allowing public entities or establishments to require proof of a mobility disability. There is no question that public entities have a legitimate interest in ferreting out fraudulent representations of mobility disabilities, especially given the recreational use of other power-driven mobility devices and the potential safety concerns created by having too many such devices in a specific facility at one time. However, the privacy of individuals with mobility disabilities and respect for those individuals, is also vitally important.

Neither § 35.137(d) of the NPRM nor § 35.137(c) of the final rule permits inquiries into the nature of a person's mobility disability. However, the Department does not believe it is unreasonable or overly intrusive for an individual with a mobility disability seeking to use an other power-driven mobility device to provide a credible assurance to verify that the use of the other power-driven mobility device is for a mobility disability. The Department sought to minimize the amount of discretion and subjectivity exercised by public entities in assessing whether an individual has a mobility disability and to allow public entities to verify the existence of a mobility disability. The solution was derived from comments made by several individuals who said they have been admitted with their Segway® PTs into public entities and public accommodations that ordinarily do not allow these devices on-site when they have presented or displayed State-issued disability parking placards. In the examples provided by commenters, the parking placards were accepted as verification that the Segway® PTs were being used as mobility devices.

Because many individuals with mobility disabilities avail themselves of State programs that issue disability parking placards or cards and because these programs have penalties for fraudulent representations of identity and disability, utilizing the parking placard system as a means to establish the existence of a mobility disability strikes a balance between the need for privacy of the individual and fraud protection for the public entity. Consequently, the Department has decided to include regulatory text in § 35.137(c)(2) of the final rule that requires public entities to accept the presentation of a valid, State-issued disability parking placard or card, or State-issued proof of disability, as verification that an individual uses the other power-driven mobility device for his or her mobility disability. A "valid" disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the State of issuance's requirements for disability placards or cards. Public entities are required to accept a valid, State-issued disability parking placard or card, or State-issued proof of disability as a credible assurance, but they cannot demand or require the presentation of a valid disability placard or card, or State-issued proof of disability, as a prerequisite for use of an other power-driven mobility device, because

not all persons with mobility disabilities have such means of proof. If an individual with a mobility disability does not have such a placard or card, or State-issued proof of disability, he or she may present other information that would serve as a credible assurance of the existence of a mobility disability.

In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a verbal representation, not contradicted by observable fact, shall be accepted as a credible assurance that the other power-driven mobility device is being used because of a mobility disability. This does not mean, however, that a mobility disability must be observable as a condition for allowing the use of an other power-driven mobility device by an individual with a mobility disability, but rather that if an individual represents that a device is being used for a mobility disability and that individual is observed thereafter engaging in a physical activity that is contrary to the nature of the represented disability, the assurance given is no longer credible and the individual may be prevented from using the device.

Possession of a valid, State-issued disability parking placard or card or a verbal assurance does not trump a public entity's valid restrictions on the use of other power-driven mobility devices. Accordingly, a credible assurance that the other power-driven mobility device is being used because of a mobility disability is not a guarantee of entry to a public entity because, notwithstanding such credible assurance, use of the device in a particular venue may be at odds with the legal standard in § 35.137(b)(1) or with one or more of the § 35.137(b)(2) factors. Only after an individual with a disability has satisfied all of the public entity's policies regarding the use of other power-driven mobility devices does a credible assurance become a factor in allowing the use of the device. For example, if an individual seeking to use an other power-driven mobility device fails to satisfy any of the public entity's stated policies regarding the use of other power-driven mobility devices, the fact that the individual legitimately possesses and presents a valid, State-issued disability parking placard or card, or State-issued proof of disability, does not trump the policy and require the public entity to allow the use of the device. In fact, in some instances, the presentation of a legitimately held placard or card, or State-issued proof of disability, will have no relevance or bearing at all on whether the other power-driven mobility device may be used, because the public entity's policy does not permit the device in question on-site under any circumstances (e.g., because its use would create a substantial risk of serious harm to the immediate environment or natural or cultural resources). Thus, an individual with a mobility disability who presents a valid disability placard or card, or State-issued proof of disability, will not be able to use an ATV as an other power-driven mobility device in a State park if the State park has adopted a policy banning their use for any or all of the above-mentioned reasons. However, if a public entity permits the use of a particular other power-driven mobility device, it cannot refuse to admit an individual with a disability who uses that device if the individual has provided a credible assurance that the use of the device is for a mobility disability.

## Section 35.138 Ticketing

The 1991 title II regulation did not contain specific regulatory language on ticketing. The ticketing policies and practices of public entities, however, are subject to title II's nondiscrimination provisions. Through the investigation of complaints, enforcement actions, and public comments related to ticketing, the Department became aware that some venue operators, ticket sellers, and distributors were violating title II's nondiscrimination mandate by not providing individuals with disabilities the same opportunities to purchase tickets for accessible seating as they provided to spectators purchasing conventional seats. In the NPRM, the Department proposed § 35.138 to provide explicit direction and guidance on discriminatory practices for entities involved in the sale or distribution of tickets.

The Department received comments from advocacy groups, assembly area trade associations, public entities, and individuals. Many commenters supported the addition of regulatory language pertaining to ticketing and urged the Department to retain it in the final rule. Several commenters, however, questioned why there were inconsistencies between the title II and title III provisions and suggested that the same language be used for both titles. The Department has decided to retain ticketing regulatory language and to ensure consistency between the ticketing provisions in title II and title III.

Because many in the ticketing industry view season tickets and other multi-event packages differently from individual tickets, the Department bifurcated some season ticket provisions from those concerning single-event tickets in the NPRM. This structure, however, resulted in some provisions being repeated for both types of tickets but not for others even though they were intended to apply to both types of tickets. The result was that it was not entirely clear that some of the provisions that were not repeated also were intended to apply to season tickets. The Department is addressing the issues raised by these commenters using a different approach. For the purposes of this section, a *single event* refers to an individual performance for which tickets may be purchased. In contrast, a *series of events* includes, but is not limited to, subscription events, event packages, season tickets, or any other tickets that may be purchased for multiple events of the same type over the course of a specified period of time whose ownership right reverts to the public entity at the end of each season or time period. Series-of-events tickets that give their holders an enhanced ability to purchase such tickets from the public entity in seasons or periods of time that follow, such as a right of first refusal or higher ranking on waiting lists for more desirable seats, are subject to the provisions in this section. In addition, the final rule merges together some NPRM paragraphs that dealt with related topics and has reordered and renamed some of the paragraphs that were in the NPRM.

**Ticket sales.** In the NPRM, the Department proposed, in § 35.138(a), a general rule that a public entity shall modify its policies, practices, or procedures to ensure that individuals with disabilities can purchase tickets for accessible seating for an event or series of events in the same way as others (i.e., during the same hours and through the same distribution methods as other seating is sold). 73 FR 34466, 34504 (June 17, 2008). "Accessible seating" is defined in § 35.138(a)(1) of the final rule to mean "wheelchair spaces and companion seats that comply with sections 221 and 802 of the 2010 Standards along with any other seats required to be offered for sale to the individual with a disability pursuant to paragraph (d) of this section." The defined term does not include designated aisle seats. A "wheelchair space" refers to a space for a single wheelchair and its occupant.

The NPRM proposed requiring that accessible seats be sold through the "same methods of distribution" as non-accessible seats. Comments from venue managers and others in the business community, in general, noted that multiple parties are involved in ticketing, and because accessible seats may not be allotted to all parties involved at each stage, such parties should be protected from liability. For example, one commenter noted that a third-party ticket vendor, like Ticketmaster, can only sell the tickets it receives from its client. Because § 35.138(a)(2)(iii) of the final rule requires venue operators to make available accessible seating through the same methods of distribution they use for their regular tickets, venue operators that provide tickets to third-party ticket vendors are required to provide accessible seating to the third-party ticket vendor. This provision will enhance third-party ticket vendors' ability to acquire and sell accessible seating for sale in the future. The Department notes that once third-party ticket vendors acquire accessible tickets, they are obligated to sell them in accordance with these rules.

The Department also has received frequent complaints that individuals with disabilities have not been able to purchase accessible seating over the Internet, and instead have had to engage in a laborious process of calling a customer service line, or sending an e-mail to a customer service representative and waiting for a response. Not only is such a process burdensome, but it puts individuals with disabilities at a

disadvantage in purchasing tickets for events that are popular and may sell out in minutes. Because § 35.138(e) of the final rule authorizes venues to release accessible seating in case of a sell-out, individuals with disabilities effectively could be cut off from buying tickets unless they also have the ability to purchase tickets in real time over the Internet. The Department's new regulatory language is designed to address this problem.

Several commenters representing assembly areas raised concerns about offering accessible seating for sale over the Internet. They contended that this approach would increase the incidence of fraud since anyone easily could purchase accessible seating over the Internet. They also asserted that it would be difficult technologically to provide accessible seating for sale in real time over the Internet, or that to do so would require simplifying the rules concerning the purchase of multiple additional accompanying seats. Moreover, these commenters argued that requiring an individual purchasing accessible seating to speak with a customer service representative would allow the venue to meet the patron's needs most appropriately and ensure that wheelchair spaces are reserved for individuals with disabilities who require wheelchair spaces. Finally, these commenters argued that individuals who can transfer effectively and conveniently from a wheelchair to a seat with a movable armrest seat could instead purchase designated aisle seats.

The Department considered these concerns carefully and has decided to continue with the general approach proposed in the NPRM. Although fraud is an important concern, the Department believes that it is best combated by other means that would not have the effect of limiting the ability of individuals with disabilities to purchase tickets, particularly since restricting the purchase of accessible seating over the Internet will, of itself, not curb fraud. In addition, the Department has identified permissible means for covered entities to reduce the incidence of fraudulent accessible seating ticket purchases in § 35.138(h) of the final rule.

Several commenters questioned whether ticket websites themselves must be accessible to individuals who are blind or have low vision, and if so, what that requires. The Department has consistently interpreted the ADA to cover websites that are operated by public entities and stated that such sites must provide their services in an accessible manner or provide an accessible alternative to the website that is available 24 hours a day, seven days a week. The final rule, therefore, does not impose any new obligation in this area. The accessibility of websites is discussed in more detail in the section of Appendix A entitled "Other Issues."

In § 35.138(b) of the NPRM, the Department also proposed requiring public entities to make accessible seating available during all stages of ticket sales including, but not limited to, presales, promotions, lotteries, waitlists, and general sales. For example, if tickets will be presold for an event that is open only to members of a fan club, or to holders of a particular credit card, then tickets for accessible seating must be made available for purchase through those means. This requirement does not mean that any individual with a disability would be able to purchase those seats. Rather, it means that an individual with a disability who meets the requirement for such a sale (e.g., who is a member of the fan club or holds that credit card) will be able to participate in the special promotion and purchase accessible seating. The Department has maintained the substantive provisions of the NPRM's § 35.138(a) and (b) but has combined them in a single paragraph at § 35.138(a)(2) of the final rule so that all of the provisions having to do with the manner in which tickets are sold are located in a single paragraph.

*Identification of available accessible seating.* In the NPRM, the Department proposed § 35.138(c), which, as modified and renumbered as paragraph (b)(3) in the final rule, requires a facility to identify available accessible seating through seating maps, brochures, or other methods if that information is made available about other seats sold to the general public. This rule requires public entities to provide

information about accessible seating to the same degree of specificity that it provides information about general seating. For example, if a seating map displays color-coded blocks pegged to prices for general seating, then accessible seating must be similarly color-coded. Likewise, if covered entities provide detailed maps that show exact seating and pricing for general seating, they must provide the same for accessible seating.

The NPRM did not specify a requirement to identify prices for accessible seating. The final rule requires that if such information is provided for general seating, it must be provided for accessible seating as well.

In the NPRM, the Department proposed in § 35.138(d) that a public entity, upon being asked, must inform persons with disabilities and their companions of the locations of all unsold or otherwise available seating. This provision is intended to prevent the practice of “steering” individuals with disabilities to certain accessible seating so that the facility can maximize potential ticket sales by releasing unsold accessible seating, especially in preferred or desirable locations, for sale to the general public. The Department received no significant comment on this proposal. The Department has retained this provision in the final rule but has added it, with minor modifications, to § 35.138(b) as paragraph (1).

**Ticket prices.** In the NPRM, the Department proposed § 35.138(e) requiring that ticket prices for accessible seating be set no higher than the prices for other seats in that seating section for that event. The NPRM's provision also required that accessible seating be made available at every price range, and if an existing facility has barriers to accessible seating within a particular price range, a proportionate amount of seating (determined by the ratio of the total number of seats at that price level to the total number of seats in the assembly area) must be offered in an accessible location at that same price. Under this rule, for example, if a public entity has a 20,000-seat facility built in 1980 with inaccessible seating in the \$20-price category, which is on the upper deck, and it chooses not to put accessible seating in that section, then it must place a proportionate number of seats in an accessible location for \$20. If the upper deck has 2,000 seats, then the facility must place 10 percent of its accessible seating in an accessible location for \$20 provided that it is part of a seating section where ticket prices are equal to or more than \$20—a facility may not place the \$20-accessible seating in a \$10-seating section. The Department received no significant comment on this rule, and it has been retained, as amended, in the final rule in § 35.138(c).

**Purchase of multiple tickets.** In the NPRM, the Department proposed § 35.138(i) to address one of the most common ticketing complaints raised with the Department: That individuals with disabilities are not able to purchase more than two tickets. The Department proposed this provision to facilitate the ability of individuals with disabilities to attend events with friends, companions, or associates who may or may not have a disability by enabling individuals with disabilities to purchase the maximum number of tickets allowed per transaction to other spectators; by requiring venues to place accompanying individuals in general seating as close as possible to accessible seating (in the event that a group must be divided because of the large size of the group); and by allowing an individual with a disability to purchase up to three additional contiguous seats per wheelchair space if they are available at the time of sale. Section 35.138(i)(2) of the NPRM required that a group containing one or more wheelchair users must be placed together, if possible, and that in the event that the group could not be placed together, the individuals with disabilities may not be isolated from the rest of the group.

The Department asked in the NPRM whether this rule was sufficient to effectuate the integration of individuals with disabilities. Many advocates and individuals praised it as a welcome and much-needed change, stating that the trade-off of being able to sit with their family or friends was worth reducing the number of seats available for individuals with disabilities. Some commenters went one step further and suggested that the number of additional accompanying seats should not be restricted to three.

Although most of the substance of the proposed provision on the purchase of multiple tickets has been maintained in the final rule, it has been renumbered as § 35.138(d), reorganized, and supplemented. To preserve the availability of accessible seating for other individuals with disabilities, the Department has not expanded the rule beyond three additional contiguous seats. Section 35.138(d)(1) of the final rule requires public entities to make available for purchase three additional tickets for seats in the same row that are contiguous with the wheelchair space provided that at the time of the purchase there are three such seats available. The requirement that the additional seats be "contiguous with the wheelchair space" does not mean that each of the additional seats must be in actual contact or have a border in common with the wheelchair space; however, at least one of the additional seats should be immediately adjacent to the wheelchair space. The Department recognizes that it will often be necessary to use vacant wheelchair spaces to provide for contiguous seating.

The Department has added paragraphs (d)(2) and (d)(3) to clarify that in situations where there are insufficient unsold seats to provide three additional contiguous seats per wheelchair space or a ticket office restricts sales of tickets to a particular event to less than four tickets per customer, the obligation to make available three additional contiguous seats per wheelchair space would be affected. For example, if at the time of purchase, there are only two additional contiguous seats available for purchase because the third has been sold already, then the ticket purchaser would be entitled to two such seats. In this situation, the public entity would be required to make up the difference by offering one additional ticket for sale that is as close as possible to the accessible seats. Likewise, if ticket purchases for an event are limited to two per customer, a person who uses a wheelchair who seeks to purchase tickets would be entitled to purchase only one additional contiguous seat for the event.

The Department also has added paragraph (d)(4) to clarify that the requirement for three additional contiguous seats is not intended to serve as a cap if the maximum number of tickets that may be purchased by members of the general public exceeds the four tickets an individual with a disability ordinarily would be allowed to purchase (*i.e.*, a wheelchair space and three additional contiguous seats). If the maximum number of tickets that may be purchased by members of the general public exceeds four, an individual with a disability is to be allowed to purchase the maximum number of tickets; however, additional tickets purchased by an individual with a disability beyond the wheelchair space and the three additional contiguous seats provided in § 35.138(d)(1) do not have to be contiguous with the wheelchair space.

The NPRM proposed at § 35.138(i)(2) that for group sales, if a group includes one or more individuals who use a wheelchair, then the group shall be placed in a seating area with accessible seating so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from the rest of the members of their group. The final rule retains the NPRM language in paragraph (d)(5).

*Hold-and-release of unsold accessible seating.* The Department recognizes that not all accessible seating will be sold in all assembly areas for every event to individuals with disabilities who need such seating and that public entities may have opportunities to sell such seating to the general public. The Department proposed in the NPRM a provision aimed at striking a balance between affording individuals with disabilities adequate time to purchase accessible seating and the entity's desire to maximize ticket sales. In the NPRM, the Department proposed § 35.138(f), which allowed for the release of accessible seating under the following circumstances:

- (i) When all seating in the facility has been sold, excluding luxury boxes, club boxes, or suites;
- (ii) when all seating in a designated area has been sold and the accessible seating being released is in the same area; or

- (iii) when all seating in a designated price range has been sold and the accessible seating being released is within the same price range.

The Department's NPRM asked "whether additional regulatory guidance is required or appropriate in terms of a more detailed or set schedule for the release of tickets in conjunction with the three approaches described above. For example, does the proposed regulation address the variable needs of assembly areas covered by the ADA? Is additional regulatory guidance required to eliminate discriminatory policies, practices and procedures related to the sale, hold, and release of accessible seating? What considerations should appropriately inform the determination of when unsold accessible seating can be released to the general public?" 73 FR 34466, 34484 (June 17, 2008).

The Department received comments both supporting and opposing the inclusion of a hold-and-release provision. One side proposed loosening the restrictions on the release of unsold accessible seating. One commenter from a trade association suggested that tickets should be released regardless of whether there is a sell-out, and that these tickets should be released according to a set schedule. Conversely, numerous individuals, advocacy groups, and at least one public entity urged the Department to tighten the conditions under which unsold tickets for accessible seating may be released. These commenters suggested that venues should not be permitted to release tickets during the first two weeks of sale, or alternatively, that they should not be permitted to be released earlier than 48 hours before a sold-out event. Many of these commenters criticized the release of accessible seating under the second and third prongs of § 35.138(f) in the NPRM (when there is a sell-out in general seating in a designated seating area or in a price range), arguing that it would create situations where general seating would be available for purchase while accessible seating would not be.

Numerous commenters—both from the industry and from advocacy groups—asked for clarification of the term "sell-out." Business groups commented that industry practice is to declare a sell-out when there are only "scattered singles" available—isolated seats that cannot be purchased as a set of adjacent pairs. Many of those same commenters also requested that "sell-out" be qualified with the phrase "of all seating available for sale" since it is industry practice to hold back from release tickets to be used for groups connected with that event (e.g., the promoter, home team, or sports league). They argued that those tickets are not available for sale and any return of these tickets to the general inventory happens close to the event date. Noting the practice of holding back tickets, one advocacy group suggested that covered entities be required to hold back accessible seating in proportion to the number of tickets that are held back for later release.

The Department has concluded that it would be inappropriate to interfere with industry practice by defining what constitutes a "sell-out" and that a public entity should continue to use its own approach to defining a "sell-out." If, however, a public entity declares a sell-out by reference to those seats that are available for sale, but it holds back tickets that it reasonably anticipates will be released later, it must hold back a proportional percentage of accessible seating to be released as well.

Adopting any of the alternatives proposed in the comments summarized above would have upset the balance between protecting the rights of individuals with disabilities and meeting venues' concerns about lost revenue from unsold accessible seating. As a result, the Department has retained § 35.138(f) (renumbered as § 35.138(e)) in the final rule.

The Department has, however, modified the regulation text to specify that accessible seating may be released only when "all non-accessible tickets in a designated seating area have been sold and the tickets for accessible seating are being released in the same designated area." As stated in the

NPRM, the Department intended for this provision to allow, for example, the release of accessible seating at the orchestra level when all other seating at the orchestra level is sold. The Department has added this language to the final rule at § 35.138(e)(1)(ii) to clarify that venues cannot designate or redesignate seating areas for the purpose of maximizing the release of unsold accessible seating. So, for example, a venue may not determine on an *ad hoc* basis that a group of seats at the orchestra level is a designated seating area in order to release unsold accessible seating in that area.

The Department also has maintained the hold-and-release provisions that appeared in the NPRM but has added a provision to address the release of accessible seating for series-of-events tickets on a series-of-events basis. Many commenters asked the Department whether unsold accessible seating may be converted to general seating and released to the general public on a season-ticket basis or longer when tickets typically are sold as a season-ticket package or other long-term basis. Several disability rights organizations and individual commenters argued that such a practice should not be permitted, and, if it were, that conditions should be imposed to ensure that individuals with disabilities have future access to those seats.

The Department interprets the fundamental principle of the ADA as a requirement to give individuals with disabilities equal, not better, access to those opportunities available to the general public. Thus, for example, a public entity that sells out its facility on a season-ticket only basis is not required to leave unsold its accessible seating if no persons with disabilities purchase those season-ticket seats. Of course, public entities may choose to go beyond what is required by reserving accessible seating for individuals with disabilities (or releasing such seats for sale to the general public) on an individual-game basis.

If a covered entity chooses to release unsold accessible seating for sale on a season-ticket or other long-term basis, it must meet at least two conditions. Under § 35.138(g) of the final rule, public entities must leave flexibility for game-day change-outs to accommodate ticket transfers on the secondary market. And public entities must modify their ticketing policies so that, in future years, individuals with disabilities will have the ability to purchase accessible seating on the same basis as other patrons (e.g., as season tickets). Put differently, releasing accessible seating to the general public on a season-ticket or other long-term basis cannot result in that seating being lost to individuals with disabilities in perpetuity. If, in future years, season tickets become available and persons with disabilities have reached the top of the waiting list or have met any other eligibility criteria for season-ticket purchases, public entities must ensure that accessible seating will be made available to the eligible individuals. In order to accomplish this, the Department has added § 35.138(e)(3)(i) to require public entities that release accessible season tickets to individuals who do not have disabilities that require the features of accessible seating to establish a process to prevent the automatic reassignment of such ticket holders to accessible seating. For example, a public entity could have in place a system whereby accessible seating that was released because it was not purchased by individuals with disabilities is not in the pool of tickets available for purchase for the following season unless and until the conditions for ticket release have been satisfied in the following season. Alternatively, a public entity might release tickets for accessible seating only when a purchaser who does not need its features agrees that he or she has no guarantee of or right to the same seats in the following season, or that if season tickets are guaranteed for the following season, the purchaser agrees that the offer to purchase tickets is limited to non-accessible seats having to the extent practicable, comparable price, view, and amenities to the accessible seats such individuals held in the prior year. The Department is aware that this rule may require some administrative changes but believes that this process will not create undue financial and

administrative burdens. The Department believes that this approach is balanced and beneficial. It will allow public entities to sell all of their seats and will leave open the possibility, in future seasons or series of events, that persons who need accessible seating may have access to it.

The Department also has added § 35.138(e)(3)(ii) to address how season tickets or series-of-events tickets that have attached ownership rights should be handled if the ownership right returns to the public entity (e.g., when holders forfeit their ownership right by failing to purchase season tickets or sell their ownership right back to a public entity). If the ownership right is for accessible seating, the public entity is required to adopt a process that allows an eligible individual with a disability who requires the features of such seating to purchase the rights and tickets for such seating.

Nothing in the regulatory text prevents a public entity from establishing a process whereby such ticket holders agree to be voluntarily reassigned from accessible seating to another seating area so that individuals with mobility disabilities or disabilities that require the features of accessible seating and who become newly eligible to purchase season tickets have an opportunity to do so. For example, a public entity might seek volunteers to relocate to another location that is at least as good in terms of its location, price, and amenities, or a public entity might use a seat with forfeited ownership rights as an inducement to get a ticket holder to give up accessible seating he or she does not need.

**Ticket transfer.** The Department received many comments asking whether accessible seating has the same transfer rights as general seats. The proposed regulation at § 35.138(e) required that individuals with disabilities must be allowed to purchase season tickets for accessible seating on the same terms and conditions as individuals purchasing season tickets for general seating, including the right—if it exists for other ticket-holders—to transfer individual tickets to friends or associates. Some commenters pointed out that the NPRM proposed explicitly allowing individuals with disabilities holding season tickets to transfer tickets but did not address the transfer of tickets purchased for individual events. Several commenters representing assembly areas argued that persons with disabilities holding tickets for an individual event should not be allowed to sell or transfer them to third parties because such ticket transfers would increase the risk of fraud or would make unclear the obligation of the entity to accommodate secondary ticket transfers. They argued that individuals holding accessible seating should either be required to transfer their tickets to another individual with a disability or return them to the facility for a refund.

Although the Department is sympathetic to concerns about administrative burden, curtailing transfer rights for accessible seating when other ticket holders are permitted to transfer tickets would be inconsistent with the ADA's guiding principle that individuals with disabilities must have rights equal to others. Thus, the Department has added language in the final rule in § 35.138(f) that requires that individuals with disabilities holding accessible seating for any event have the same transfer rights accorded other ticket holders for that event. Section 35.138(f) also preserves the rights of individuals with disabilities who hold tickets to accessible seats for a series of events to transfer individual tickets to others, regardless of whether the transferee needs accessible seating. This approach recognizes the common practice of individuals splitting season tickets or other multi-event ticket packages with friends, colleagues, or other spectators to make the purchase of season tickets affordable; individuals with disabilities should not be placed in the burdensome position of having to find another individual with a disability with whom to share the package.

This provision, however, does not require public entities to seat an individual who holds a ticket to an accessible seat in such seating if the individual does not need the accessible features of the seat. A public entity may reserve the right to switch these individuals to different seats if they are available, but a

public entity is not required to remove a person without a disability who is using accessible seating from that seating, even if a person who uses a wheelchair shows up with a ticket from the secondary market for a non-accessible seat and wants accessible seating.

**Secondary ticket market.** Section 35.138(g) is a new provision in the final rule that requires a public entity to modify its policies, practices, or procedures to ensure that an individual with a disability, who acquires a ticket in the secondary ticket market, may use that ticket under the same terms and conditions as other ticket holders who acquire a ticket in the secondary market for an event or series of events. This principle was discussed in the NPRM in connection with § 35.138(e), pertaining to season-ticket sales. There, the Department asked for public comment regarding a public entity's proposed obligation to accommodate the transfer of accessible seating tickets on the secondary ticket market to those who do not need accessible seating and vice versa.

The secondary ticket market, for the purposes of this rule, broadly means any transfer of tickets after the public entity's initial sale of tickets to individuals or entities. It thus encompasses a wide variety of transactions, from ticket transfers between friends to transfers using commercial exchange systems. Many commenters noted that the distinction between the primary and secondary ticket market has become blurred as a result of agreements between teams, leagues, and secondary market sellers. These commenters noted that the secondary market may operate independently of the public entity, and parts of the secondary market, such as ticket transfers between friends, undoubtedly are outside the direct jurisdiction of the public entity.

To the extent that venues seat persons who have purchased tickets on the secondary market, they must similarly seat persons with disabilities who have purchased tickets on the secondary market. In addition, some public entities may acquire ADA obligations directly by formally entering the secondary ticket market.

The Department's enforcement experience with assembly areas also has revealed that venues regularly provide for and make last-minute seat transfers. As long as there are vacant wheelchair spaces, requiring venues to provide wheelchair spaces for patrons who acquired inaccessible seats and need wheelchair spaces is an example of a reasonable modification of a policy under title II of the ADA. Similarly, a person who has a ticket for a wheelchair space but who does not require its accessible features could be offered non-accessible seating if such seating is available.

The Department's longstanding position that title II of the ADA requires venues to make reasonable modifications in their policies to allow individuals with disabilities who acquired non-accessible tickets on the secondary ticket market to be seated in accessible seating, where such seating is vacant, is supported by the only Federal court to address this issue. See *Independent Living Resources v. Oregon Arena Corp.*, 1 F. Supp. 2d 1159, 1171 (D. Or. 1998). The Department has incorporated this position into the final rule at § 35.138(g)(2).

The NPRM contained two questions aimed at gauging concern with the Department's consideration of secondary ticket market sales. The first question asked whether a secondary purchaser who does not have a disability and who buys an accessible seat should be required to move if the space is needed for someone with a disability.

Many disability rights advocates answered that the individual should move provided that there is a seat of comparable or better quality available for him and his companion. Some venues, however, expressed concerns about this provision, and asked how they are to identify who should be moved and what obligations apply if there are no seats available that are equivalent or better in quality.

The Department's second question asked whether there are particular concerns about the obligation to provide accessible seating, including a wheelchair space, to an individual with a disability who purchases an inaccessible seat through the secondary market.

Industry commenters contended that this requirement would create a "logistical nightmare," with venues scrambling to reseat patrons in the short time between the opening of the venues' doors and the commencement of the event. Furthermore, they argued that they might not be able to reseat all individuals and that even if they were able to do so, patrons might be moved to inferior seats (whether in accessible or non-accessible seating). These commenters also were concerned that they would be sued by patrons moved under such circumstances.

These commenters seem to have misconstrued the rule. Covered entities are not required to seat every person who acquires a ticket for inaccessible seating but needs accessible seating, and are not required to move any individual who acquires a ticket for accessible seating but does not need it. Covered entities that allow patrons to buy and sell tickets on the secondary market must make reasonable modifications to their policies to allow persons with disabilities to participate in secondary ticket transfers. The Department believes that there is no one-size-fits-all rule that will suit all assembly areas. In those circumstances where a venue has accessible seating vacant at the time an individual with a disability who needs accessible seating presents his ticket for inaccessible seating at the box office, the venue must allow the individual to exchange his ticket for an accessible seat in a comparable location if such an accessible seat is vacant. Where, however, a venue has sold all of its accessible seating, the venue has no obligation to provide accessible seating to the person with a disability who purchased an inaccessible seat on the secondary market. Venues may encourage individuals with disabilities who hold tickets for inaccessible seating to contact the box office before the event to notify them of their need for accessible seating, even though they may not require ticketholders to provide such notice.

The Department notes that public entities are permitted, though not required, to adopt policies regarding moving patrons who do not need the features of an accessible seat. If a public entity chooses to do so, it might mitigate administrative concerns by marking tickets for accessible seating as such, and printing on the ticket that individuals who purchase such seats but who do not need accessible seating are subject to being moved to other seats in the facility if the accessible seating is required for an individual with a disability. Such a venue might also develop and publish a ticketing policy to provide transparency to the general public and to put holders of tickets for accessible seating who do not require it on notice that they may be moved.

*Prevention of fraud in purchase of accessible seating.* Assembly area managers and advocacy groups have informed the Department that the fraudulent purchase of accessible seating is a pressing concern. Curbing fraud is a goal that public entities and individuals with disabilities share. Steps taken to prevent fraud, however, must be balanced carefully against the privacy rights of individuals with disabilities. Such measures also must not impose burdensome requirements upon, nor restrict the rights of, individuals with disabilities.

In the NPRM, the Department struck a balance between these competing concerns by proposing § 35.138(h), which prohibited public entities from asking for proof of disability before the purchase of accessible seating but provided guidance in two paragraphs on appropriate measures for curbing fraud. Paragraph (1) proposed allowing a public entity to ask individuals purchasing single-event tickets for accessible seating whether they are wheelchair users. Paragraph (2) proposed allowing a public entity to require the individuals purchasing accessible seating for season tickets or other multi-event ticket

packages to attest in writing that the accessible seating is for a wheelchair user. Additionally, the NPRM proposed to permit venues, when they have good cause to believe that an individual has fraudulently purchased accessible seating, to investigate that individual.

Several commenters objected to this rule on the ground that it would require a wheelchair user to be the purchaser of tickets. The Department has reworded this paragraph to reflect that the individual with a disability does not have to be the ticket purchaser. The final rule allows third parties to purchase accessible tickets at the request of an individual with a disability.

Commenters also argued that other individuals with disabilities who do not use wheelchairs should be permitted to purchase accessible seating. Some individuals with disabilities who do not use wheelchairs urged the Department to change the rule, asserting that they, too, need accessible seating. The Department agrees that such seating, although designed for use by a wheelchair user, may be used by non-wheelchair users, if those persons are persons with a disability who need to use accessible seating because of a mobility disability or because their disability requires the use of the features that accessible seating provides (e.g., individuals who cannot bend their legs because of braces, or individuals who, because of their disability, cannot sit in a straight-back chair).

Some commenters raised concerns that allowing venues to ask questions to determine whether individuals purchasing accessible seating are doing so legitimately would burden individuals with disabilities in the purchase of accessible seating. The Department has retained the substance of this provision in § 35.138(h) of the final rule, but emphasizes that such questions should be asked at the initial time of purchase. For example, if the method of purchase is via the Internet, then the question(s) should be answered by clicking a yes or no box during the transaction. The public entity may warn purchasers that accessible seating is for individuals with disabilities and that individuals purchasing such tickets fraudulently are subject to relocation.

One commenter argued that face-to-face contact between the venue and the ticket holder should be required in order to prevent fraud and suggested that individuals who purchase accessible seating should be required to pick up their tickets at the box office and then enter the venue immediately. The Department has declined to adopt that suggestion. It would be discriminatory to require individuals with disabilities to pick up tickets at the box office when other spectators are not required to do so. If the assembly area wishes to make face-to-face contact with accessible seating ticket holders to curb fraud, it may do so through its ushers and other customer service personnel located within the seating area.

Some commenters asked whether it is permissible for assembly areas to have voluntary clubs where individuals with disabilities self-identify to the public entity in order to become a member of a club that entitles them to purchase accessible seating reserved for club members or otherwise receive priority in purchasing accessible seating. The Department agrees that such clubs are permissible, provided that a reasonable amount of accessible seating remains available at all prices and dispersed at all locations for individuals with disabilities who are non-members.

## § 35.139 Direct threat

In Appendix A of the Department's 1991 title II regulation, the Department included a detailed discussion of "direct threat" that, among other things, explained that "the principles established in § 36.208 of the Department's [title III] regulation" were "applicable" as well to title II, insofar as "questions of safety are

involved." 28 CFR part 35, app. A at 565 (2009). In the final rule, the Department has included specific requirements related to "direct threat" that parallel those in the title III rule. These requirements are found in new § 35.139.

## Subpart D—Program Accessibility

### Section 35.150(b)(2) Safe harbor

The "program accessibility" requirement in regulations implementing title II of the Americans with Disabilities Act requires that each service, program, or activity, *when viewed in its entirety*, be readily accessible to and usable by individuals with disabilities. 28 CFR 35.150(a). Because title II evaluates a public entity's programs, services, and activities in their entirety, public entities have flexibility in addressing accessibility issues. Program access does not necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities, and public entities are not required to make structural changes to existing facilities where other methods are effective in achieving program access. See *id.*<sup>[3]</sup> Public entities do, however, have program access considerations that are independent of, but may coexist with, requirements imposed by new construction or alteration requirements in those same facilities.

Where a public entity opts to alter existing facilities to comply with its program access requirements, the entity must meet the accessibility requirements for alterations set out in § 35.151. Under the final rule, these alterations will be subject to the 2010 Standards. The 2010 Standards introduce technical and scoping specifications for many elements not covered by the 1991 Standards. In existing facilities, these supplemental requirements need to be taken into account by a public entity in ensuring program access. Also included in the 2010 Standards are revised technical and scoping requirements for a number of elements that were addressed in the 1991 Standards. These revised requirements reflect incremental changes that were added either because of additional study by the Access Board or in order to harmonize requirements with the model codes.

Although the program accessibility standard offers public entities a level of discretion in determining how to achieve program access, in the NPRM, the Department proposed an addition to § 35.150 at § 35.150(b)(2), denominated "Safe Harbor," to clarify that "[i]f a public entity has constructed or altered elements \*\*\* in accordance with the specifications in either the 1991 Standards or the Uniform Federal Accessibility Standard, such public entity is not, solely because of the Department's adoption of the [2010] Standards, required to retrofit such elements to reflect incremental changes in the proposed standards." 73 FR 34466, 34505 (June 17, 2008). In these circumstances, the public entity would be entitled to a safe harbor for the already compliant elements until those elements are altered. The safe harbor does not negate a public entity's new construction or alteration obligations. A public entity must comply with the new construction or alteration requirements in effect at the time of the construction or alteration. With respect to existing facilities designed and constructed after January 26, 1992, but before the public entities are required to comply with the 2010 Standards, the rule is that any elements in these facilities that were not constructed in conformance with UFAS or the 1991 Standards are in violation of the ADA and must be brought into compliance. If elements in existing facilities were altered after January 26, 1992, and those alterations were not made in conformance with the alteration requirements in effect at the time, then those

<sup>[3]</sup> The term "existing facility" is defined in § 35.104 as amended by this rule.

alteration violations must be corrected. Section 35.150(b)(2) of the final rule specifies that until the compliance date for the Standards (18 months from the date of publication of the rule), facilities or elements covered by § 35.151(a) or (b) that are noncompliant with either the 1991 Standards or UFAS shall be made accessible in accordance with the 1991 Standards, UFAS, or the 2010 Standards. Once the compliance date is reached, such noncompliant facilities or elements must be made accessible in accordance with the 2010 Standards.

The Department received many comments on the safe harbor during the 60-day public comment period. Advocacy groups were opposed to the safe harbor for compliant elements in existing facilities. These commenters objected to the Department's characterization of revisions between the 1991 and 2010 Standards as incremental changes and assert that these revisions represent important advances in accessibility for individuals with disabilities. Commenters saw no basis for "grandfathering" outdated accessibility standards given the flexibility inherent in the program access standard. Others noted that title II's "undue financial and administrative burdens" and "fundamental alteration" defenses eliminate any need for further exemptions from compliance. Some commenters suggested that entities' past efforts to comply with the program access standard of 28 CFR 35.150(a) might appropriately be a factor in determining what is required in the future.

Many public entities welcomed the Department's proposed safe harbor. These commenters contend that the safe harbor allows public entities needed time to evaluate program access in light of the 2010 Standards, and incorporate structural changes in a careful and thoughtful way toward increasing accessibility entity-wide. Many felt that it would be an ineffective use of public funds to update buildings to retrofit elements that had already been constructed or modified to Department-issued and sanctioned specifications. One entity pointed to the "possibly budget-breaking" nature of forcing compliance with incremental changes.

The Department has reviewed and considered all information received during the 60-day public comment period. Upon review, the Department has decided to retain the title II safe harbor with minor revisions. The Department believes that the safe harbor provides an important measure of clarity and certainty for public entities as to the effect of the final rule with respect to existing facilities. Additionally, by providing a safe harbor for elements already in compliance with the technical and scoping specifications in the 1991 Standards or UFAS, funding that would otherwise be spent on incremental changes and repeated retrofitting is freed up to be used toward increased entity-wide program access. Public entities may thereby make more efficient use of the resources available to them to ensure equal access to their services, programs, or activities for all individuals with disabilities.

The safe harbor adopted with this final rule is a narrow one, as the Department recognizes that this approach may delay, in some cases, the increased accessibility that the revised requirements would provide, and that for some individuals with disabilities the impact may be significant. This safe harbor operates only with respect to elements that are in compliance with the scoping and technical specifications in either the 1991 Standards or UFAS; it does not apply to supplemental requirements, those elements for which scoping and technical specifications are first provided in the 2010 Standards.

## Existing Facilities

**Existing play areas.** The 1991 Standards do not include specific requirements for the design and construction of play areas. To meet program accessibility requirements where structural changes are necessary, public entities have been required to apply the general new construction and alteration standards to the greatest extent possible, including with respect to accessible parking, routes to the playground, playground equipment, and playground amenities (e.g., picnic tables and restrooms). The Access Board published final guidelines for play areas in October 2000. The guidelines extended beyond general playground access to establish specific scoping and technical requirements for ground-level and elevated play

components, accessible routes connecting the components, accessible ground surfaces, and maintenance of those surfaces. These guidelines filled a void left by the 1991 Standards. They have been referenced in Federal playground construction and safety guidelines and have been used voluntarily when many play areas across the country have been altered or constructed.

In adopting the 2004 ADAAG (which includes the 2000 play area guidelines), the Department acknowledges both the importance of integrated, full access to play areas for children and parents with disabilities, as well as the need to avoid placing an untenable fiscal burden on public entities. In the NPRM, the Department stated it was proposing two specific provisions to reduce the impact on existing facilities that undertake structural modifications pursuant to the program accessibility requirement. First, the Department proposed in § 35.150(b)(4) that existing play areas that are not being altered would be permitted to meet a reduced scoping requirement with respect to their elevated play components.

Elevated play components, which are found on most playgrounds, are the individual components that are linked together to form large-scale composite playground equipment (e.g., the monkey bars attached to the suspension bridge attached to the tube slide, etc.) The 2010 Standards provide that a play area that includes both ground level and elevated play components must ensure that a specified number of the ground-level play components and at least 50 percent of the elevated play components are accessible.

In the NPRM, the Department asked for specific public comment with regard to whether existing play areas should be permitted to substitute additional ground-level play components for the elevated play components they would otherwise have been required to make accessible. The Department also queried if there were other requirements applicable to play areas in the 2004 ADAAG for which the Department should consider exemptions or reduced scoping. Many commenters opposed permitting existing play areas to make such substitutions. Several commenters stated that the Access Board already completed significant negotiation and cost balancing in its rulemaking, so no additional exemptions should be added in either meeting program access requirements or in alterations. Others noted that elevated components are generally viewed as the more challenging and exciting by children, so making more ground than elevated play components accessible would result in discrimination against children with disabilities in general and older children with disabilities in particular. They argued that the ground components would be seen as equipment for younger children and children with disabilities, while elevated components would serve only older children without disabilities. In addition, commenters advised that including additional ground-level play components would require more accessible route and use zone surfacing, which would result in a higher cost burden than making elevated components accessible.

The Department also asked for public comment on whether it would be appropriate for the Access Board to consider issuing guidelines for alterations to play and recreational facilities that would permit reduced scoping of accessible components or substitution of ground-level play components in lieu of elevated play components. Most commenters opposed any additional reductions in scoping and substitutions. These commenters uniformly stated that the Access Board completed sufficient negotiation during its rulemaking on its play area guidelines published in 2000 and that those guidelines consequently should stand as is. One commenter advocated reduced scoping and substitution of ground play components during alterations only for those play areas built prior to the finalization of the guidelines.

The Department has considered the comments it has received and has determined that it is not necessary to provide a specific exemption to the scoping for components for existing play areas or to recommend reduced scoping or additional exemptions for alteration, and has deleted the reduced scoping proposed in NPRM § 35.150(b)(4)(i) from the final rule. The Department believes that it is preferable for public entities to try to achieve compliance with the design standards established in the

2010 Standards. If this is not possible to achieve in an existing setting, the requirements for program accessibility provide enough flexibility to permit the covered entity to pursue alternative approaches to provide accessibility.

Second, in § 35.150(b)(5)(i) of the NPRM, the Department proposed language stating that existing play areas that are less than 1,000 square feet in size and are not otherwise being altered, need not comply with the scoping and technical requirements for play areas in section 240 of the 2004 ADAAG. The Department stated it selected this size based on the provision in section 1008.2.4.1 of the 2004 ADAAG, Exception 1, which permits play areas less than 1,000 square feet in size to provide accessible routes with a reduced clear width (44 inches instead of 60 inches). In its 2000 regulatory assessment for the play area guidelines, the Access Board assumed that such "small" play areas represented only about 20 percent of the play areas located in public schools, and none of the play areas located in city and State parks (which the Board assumed were typically larger than 1,000 square feet).

In the NPRM, the Department asked if existing play areas less than 1,000 square feet should be exempt from the requirements applicable to play areas. The vast majority of commenters objected to such an exemption. One commenter stated that many localities that have parks this size are already making them accessible; many cited concerns that this would leave all or most public playgrounds in small towns inaccessible; and two commenters stated that, since many of New York City's parks are smaller than 1,000 square feet, only scattered larger parks in the various boroughs would be obliged to become accessible. Residents with disabilities would then have to travel substantial distances outside their own neighborhoods to find accessible playgrounds. Some commenters responded that this exemption should not apply in instances where the play area is the only one in the program, while others said that if a play area is exempt for reasons of size, but is the only one in the area, then it should have at least an accessible route and 50 percent of its ground-level play components accessible. One commenter supported the exemption as presented in the question.

The Department is persuaded by these comments that it is inappropriate to exempt public play areas that are less than 1,000 square feet in size. The Department believes that the factors used to determine program accessibility, including the limits established by the undue financial and administrative burdens defense, provide sufficient flexibility to public entities in determining how to make their existing play areas accessible. In those cases where a title II entity believes that present economic concerns make it an undue financial and administrative burden to immediately make its existing playgrounds accessible in order to comply with program accessibility requirements, then it may be reasonable for the entity to develop a multi-year plan to bring its facilities into compliance.

In addition to requesting public comment about the specific sections in the NPRM, the Department also asked for public comment about the appropriateness of a general safe harbor for existing play areas and a safe harbor for public entities that have complied with State or local standards specific to play areas. In the almost 200 comments received on title II play areas, the vast majority of commenters strongly opposed all safe harbors, exemptions, and reductions in scoping. By contrast, one commenter advocated a safe harbor from compliance with the 2004 ADAAG play area requirements along with reduced scoping and exemptions for both program accessibility and alterations; a second commenter advocated only the general safe harbor from compliance with the supplemental requirements.

In response to the question of whether the Department should exempt public entities from specific compliance with the supplemental requirements for play areas, commenters stated that since no specific standards previously existed, play areas are more than a decade behind in providing full access for individuals with disabilities. When accessible play areas were created, public entities, acting in good faith, built them according to the 2004 ADAAG requirements; many equipment manufacturers also developed

equipment to meet those guidelines. If existing playgrounds were exempted from compliance with the supplemental guidelines, commenters said, those entities would be held to a lesser standard and left with confusion, a sense of wasted resources, and federally condoned discrimination and segregation. Commenters also cited Federal agency settlement agreements on play areas that required compliance with the guidelines. Finally, several commenters observed that the provision of a safe harbor in this instance was invalid for two reasons: (1) The rationale for other safe harbors—that entities took action to comply with the 1991 Standards and should not be further required to comply with new standards—does not exist; and (2) concerns about financial and administrative burdens are adequately addressed by program access requirements.

The question of whether accessibility of play areas should continue to be assessed on the basis of case-by-case evaluations elicited conflicting responses. One commenter asserted that there is no evidence that the case-by-case approach is not working and so it should continue until found to be inconsistent with the ADA's goals. Another commenter argued that case-by-case evaluations result in unpredictable outcomes which result in costly and long court actions. A third commenter, advocating against case-by-case evaluations, requested instead increased direction and scoping to define what constitutes an accessible play area program.

The Department has considered all of the comments it received in response to its questions and has concluded that there is insufficient basis to establish a safe harbor from compliance with the supplemental guidelines. Thus, the Department has eliminated the proposed exemption contained in § 35.150(b)(5)(i) of the NPRM for existing play areas that are less than 1,000 square feet. The Department believes that the factors used to determine program accessibility, including the limits established by the undue financial and administrative burdens defense, provide sufficient flexibility to public entities in determining how to make their existing play areas accessible.

In the NPRM, the Department also asked whether there are State and local standards addressing play and recreation area accessibility and, to the extent that there are such standards, whether facilities currently governed by, and in compliance with, such State and local standards or codes should be subject to a safe harbor from compliance with applicable requirements in the 2004 ADAAG. The Department also asked whether it would be appropriate for the Access Board to consider the implementation of guidelines that would permit such a safe harbor with respect to play and recreation areas undertaking alterations. In response, commenters stated that few State or local governments have standards that address issues of accessibility in play areas, and one commenter organization said that it was unaware of any State or local standards written specifically for accessible play areas. One commenter observed from experience that most State and local governments were waiting for the Access Board guidelines to become enforceable standards as they had no standards themselves to follow. Another commenter offered that public entities across the United States already include in their playground construction bid specifications language that requires compliance with the Access Board's guidelines. A number of commenters advocated for the Access Board's guidelines to become comprehensive Federal standards that would complement any abbreviated State and local standards. One commenter, however, supported a safe harbor for play areas undergoing alterations if the areas currently comply with State or local standards.

The Department is persuaded by these comments that there is insufficient basis to establish a safe harbor for program access or alterations for play areas built in compliance with State or local laws.

In the NPRM, the Department asked whether “a reasonable number, but at least one” is a workable standard to determine the appropriate number of existing play areas that a public entity must make accessible. Many commenters objected to this standard, expressing concern that the phrase “at least one” would be interpreted as a maximum rather than a minimum requirement. Such commenters feared

that this language would allow local governments to claim compliance by making just one public park accessible, regardless of the locality's size, budget, or other factors, and would support segregation, forcing children with disabilities to leave their neighborhoods to enjoy an accessible play area. While some commenters criticized what they viewed as a new analysis of program accessibility, others asserted that the requirements of program accessibility should be changed to address issues related to play areas that are not the main program in a facility but are essential components of a larger program (e.g., drop-in child care for a courthouse).

The Department believes that those commenters who opposed the Department's "reasonable number, but at least one" standard for program accessibility misunderstood the Department's proposal. The Department did not intend any change in its longstanding interpretation of the program accessibility requirement. Program accessibility requires that each service, program, or activity be operated "so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities," 28 CFR 35.150(a), subject to the undue financial and administrative burdens and fundamental alterations defenses provided in 28 CFR 35.150. In determining how many facilities of a multi-site program must be made accessible in order to make the overall program accessible, the standard has always been an assessment of what is reasonable under the circumstances to make the program readily accessible to and usable by individuals with disabilities, taking into account such factors as the size of the public entity, the particular program features offered at each site, the geographical distance between sites, the travel times to the sites, the number of sites, and availability of public transportation to the sites. In choosing among available methods for meeting this requirement, public entities are required to give priority "to those methods that offer services, programs, and activities \*\*\* in the most integrated setting appropriate." 28 CFR 35.150(b)(1). As a result, in cases where the sites are widely dispersed with difficult travel access and where the program features offered vary widely between sites, program accessibility will require a larger number of facilities to be accessible in order to ensure program accessibility than where multiple sites are located in a concentrated area with easy travel access and uniformity in program offerings.

Commenters responded positively to the Department's question in the NPRM whether the final rule should provide a list of factors that a public entity should use to determine how many of its existing play areas should be made accessible. Commenters also asserted strongly that the number of existing parks in the locality should not be the main factor. In addition to the Department's initial list—including number of play areas in an area, travel times or geographic distances between play areas, and the size of the public entity—commenters recommended such factors as availability of accessible pedestrian routes to the playgrounds, ready availability of accessible transportation, comparable amenities and services in and surrounding the play areas, size of the playgrounds, and sufficient variety in accessible play components within the playgrounds. The Department agrees that these factors should be considered, where appropriate, in any determination of whether program accessibility has been achieved. However, the Department has decided that it need not address these factors in the final rule itself because the range of factors that might need to be considered would vary depending upon the circumstances of particular public entities. The Department does not believe any list would be sufficiently comprehensive to cover every situation.

The Department also requested public comment about whether there was a "tipping point" at which the costs of compliance with the new requirements for existing play areas would be so burdensome that the entity would simply shut down the playground. Commenters generally questioned the feasibility of determining a "tipping point." No commenters offered a recommended "tipping point." Moreover, most commenters stated that a "tipping point" is not a valid consideration for various reasons, including that "tipping points" will vary based upon each entity's budget and other mandates, and costs that are too high

will be addressed by the limitations of the undue financial and administrative burdens defense in the program accessibility requirement and that a “tipping point” must be weighed against quality of life issues, which are difficult to quantify. The Department has decided that comments did not establish any clear “tipping point” and therefore provides no regulatory requirement in this area.

**Swimming pools.** The 1991 Standards do not contain specific scoping or technical requirements for swimming pools. As a result, under the 1991 title II regulation, title II entities that operate programs or activities that include swimming pools have not been required to provide an accessible route into those pools via a ramp or pool lift, although they are required to provide an accessible route to such pools. In addition, these entities continue to be subject to the general title II obligation to make their programs usable and accessible to persons with disabilities.

The 2004 ADAAG includes specific technical and scoping requirements for new and altered swimming pools at sections 242 and 1009. In the NPRM, the Department sought to address the impact of these requirements on existing swimming pools. Section 242.2 of the 2004 ADAAG states that swimming pools must provide two accessible means of entry, except that swimming pools with less than 300 linear feet of swimming pool wall are only required to provide one accessible means of entry, provided that the accessible means of entry is either a swimming pool lift complying with section 1009.2 or a sloped entry complying with section 1009.3.

In the NPRM, the Department proposed, in § 35.150(b)(4)(ii), that for measures taken to comply with title II's program accessibility requirements, existing swimming pools with at least 300 linear feet of swimming pool wall would be required to provide only one accessible means of access that complied with section 1009.2 or section 1009.3 of the 2004 ADAAG.

The Department specifically sought comment from public entities and individuals with disabilities on the question whether the Department should “allow existing public entities to provide only one accessible means of access to swimming pools more than 300 linear feet long?” The Department received significant public comment on this proposal.

Most commenters opposed any reduction in the scoping required in the 2004 ADAAG, citing the fact that swimming is a common therapeutic form of exercise for many individuals with disabilities. Many commenters also stated that the cost of a swimming pool lift, approximately \$5,000, or other nonstructural options for pool access such as transfer steps, transfer walls, and transfer platforms, would not be an undue financial and administrative burden for most title II entities. Other commenters pointed out that the undue financial and administrative burdens defense already provided public entities with a means to reduce their scoping requirements. A few commenters cited safety concerns resulting from having just one accessible means of access, and stated that because pools typically have one ladder for every 75 linear feet of pool wall, they should have more than one accessible means of access. One commenter stated that construction costs for a public pool are approximately \$4,000-4,500 per linear foot, making the cost of a pool with 300 linear feet of swimming pool wall approximately \$1.2 million, compared to \$5,000 for a pool lift. Some commenters did not oppose the one accessible means of access for larger pools so long as a lift was used. A few commenters approved of the one accessible means of access for larger pools. The Department also considered the American National Standard for Public Swimming Pools, ANSI/NSPI-1 2003, section 23 of which states that all pools should have at least two means of egress.

In the NPRM, the Department also proposed at § 35.150(b)(5)(ii) that existing swimming pools with less than 300 linear feet of swimming pool wall be exempted from having to comply with the provisions of section 242.2. The Department's NPRM requested public comment about the potential effect of this approach, asking whether existing swimming pools with less than 300 linear feet of pool wall should be exempt from the requirements applicable to swimming pools.

Most commenters were opposed to this proposal. A number of commenters stated, based on the Access Board estimates that 90 percent of public high school pools, 40 percent of public park and community center pools, and 30 percent of public college and university pools have less than 300 linear feet of pool wall, that a large number of public swimming pools would fall under this exemption. Other commenters pointed to the existing undue financial and administrative burdens defenses as providing public entities with sufficient protection from excessive compliance costs. Few commenters supported this exemption.

The Department also considered the fact that many existing swimming pools owned or operated by public entities are recipients of Federal financial assistance and therefore, are also subject to the program accessibility requirements of section 504 of the Rehabilitation Act.

The Department has carefully considered all the information available to it including the comments submitted on these two proposed exemptions for swimming pools owned or operated by title II entities. The Department acknowledges that swimming provides important therapeutic, exercise, and social benefits for many individuals with disabilities and is persuaded that exemption of many publicly owned or operated pools from the 2010 Standards is neither appropriate nor necessary. The Department agrees with the commenters that title II already contains sufficient limitations on public entities' obligations to make their programs accessible. In particular, the Department agrees that those public entities that can demonstrate that making particular existing swimming pools accessible in accordance with the 2010 Standards would be an undue financial and administrative burden are sufficiently protected from excessive compliance costs. Thus, the Department has eliminated proposed §§ 35.150(b)(4)(ii) and (b)(5)(ii) from the final rule.

In addition, although the NPRM contained no specific proposed regulatory language on this issue, the NPRM sought comment on what would be a workable standard for determining the appropriate number of existing swimming pools that a public entity must make accessible for its program to be accessible. The Department asked whether a "reasonable number, but at least one" would be a workable standard and, if not, whether there was a more appropriate specific standard. The Department also asked if, in the alternative, the Department should provide "a list of factors that a public entity could use to determine how many of its existing swimming pools to make accessible, e.g., number of swimming pools, travel times or geographic distances between swimming pools, and the size of the public entity?"

A number of commenters expressed concern over the "reasonable number, but at least one" standard and contended that, in reality, public entities would never provide more than one accessible existing pool, thus segregating individuals with disabilities. Other commenters felt that the existing program accessibility standard was sufficient. Still others suggested that one in every three existing pools should be made accessible. One commenter suggested that all public pools should be accessible. Some commenters proposed a list of factors to determine how many existing pools should be accessible. Those factors include the total number of pools, the location, size, and type of pools provided, transportation availability, and lessons and activities available. A number of commenters suggested that the standard should be based on geographic areas, since pools serve specific neighborhoods. One commenter argued that each pool should be examined individually to determine what can be done to improve its accessibility.

The Department did not include any language in the final rule that specifies the “reasonable number, but at least one” standard for program access. However, the Department believes that its proposal was misunderstood by many commenters. Each service, program, or activity conducted by a public entity, when viewed in its entirety, must still be readily accessible to and usable by individuals with disabilities unless doing so would result in a fundamental alteration in the nature of the program or activity or in undue financial and administrative burdens. Determining which pool(s) to make accessible and whether more than one accessible pool is necessary to provide program access requires analysis of a number of factors, including, but not limited to, the size of the public entity, geographical distance between pool sites, whether more than one community is served by particular pools, travel times to the pools, the total number of pools, the availability of lessons and other programs and amenities at each pool, and the availability of public transportation to the pools. In many instances, making one existing swimming pool accessible will not be sufficient to ensure program accessibility. There may, however, be some circumstances where a small public entity can demonstrate that modifying one pool is sufficient to provide access to the public entity's program of providing public swimming pools. In all cases, a public entity must still demonstrate that its programs, including the program of providing public swimming pools, when viewed in their entirety, are accessible.

***Wading pools.*** The 1991 Standards do not address wading pools. Section 242.3 of the 2004 ADAAG requires newly constructed or altered wading pools to provide at least one sloped means of entry to the deepest part of the pool. The Department was concerned about the potential impact of this new requirement on existing wading pools. Therefore, in the NPRM, the Department sought comments on whether existing wading pools that are not being altered should be exempt from this requirement, asking, “[w]hat site constraints exist in existing facilities that could make it difficult or infeasible to install a sloped entry in an existing wading pool? Should existing wading pools that are not being altered be exempt from the requirement to provide a sloped entry?” 73 FR 34466, 34487-88 (June 17, 2008). Most commenters agreed that existing wading pools that are not being altered should be exempt from this requirement. Almost all commenters felt that during alterations a sloped entry should be provided unless it was technically infeasible to do so. Several commenters felt that the required clear deck space surrounding a pool provided sufficient space for a sloped entry during alterations.

The Department also solicited comments on the possibility of exempting existing wading pools from the obligation to provide program accessibility. Most commenters argued that installing a sloped entry in an existing wading pool is not very feasible. Because covered entities are not required to undertake modifications that would be technically infeasible, the Department believes that the rule as drafted provides sufficient protection from unwarranted expense to the operators of small existing wading pools. Other existing wading pools, particularly those larger pools associated with facilities such as aquatic centers or water parks, must be assessed on a case-by-case basis. Therefore, the Department has not included such an exemption for wading pools in its final rule.

***Saunas and steam rooms.*** The 1991 Standards do not address saunas and steam rooms. Section 35.150(b)(5)(iii) of the NPRM exempted existing saunas and steam rooms that seat only two individuals and were not being altered from section 241 of the 2004 ADAAG, which requires an accessible turning space. Two commenters objected to this exemption as unnecessary, and argued that the cost of accessible saunas is not high and public entities still have an undue financial and administrative burdens defense.

The Department considered these comments and has decided to eliminate the exemption for existing saunas and steam rooms that seat only two people. Such an exemption is unnecessary because covered entities will not be subject to program accessibility requirements to make existing saunas and steam rooms accessible if doing so constitutes an undue financial and administrative burden. The Department

believes it is likely that because of their pre-fabricated forms, which include built-in seats, it would be either technically infeasible or an undue financial and administrative burden to modify such saunas and steam rooms. Consequently, a separate exemption for saunas and steam rooms would have been superfluous. Finally, employing the program accessibility standard for small saunas and steam rooms is consistent with the Department's decisions regarding the proposed exemptions for play areas and swimming pools.

Several commenters also argued in favor of a specific exemption for existing spas. The Department notes that the technical infeasibility and program accessibility defenses are applicable equally to existing spas and declines to adopt such an exemption.

**Other recreational facilities.** In the NPRM, the Department asked about a number of issues relating to recreation facilities such as team or player seating areas, areas of sport activity, exercise machines, boating facilities, fishing piers and platforms, and miniature golf courses. The Department's questions addressed the costs and benefits of applying the 2004 ADAAG to these spaces and facilities and the application of the specific technical requirements in the 2004 ADAAG for these spaces and facilities. The discussion of the comments received by the Department on these issues and the Department's response to those comments can be found in either the section of Appendix A to this rule entitled "Other Issues," or in Appendix B to the final title III rule, which will be published today elsewhere in this volume.

## Section 35.151 New construction and alterations

Section 35.151(a), which provided that those facilities that are constructed or altered by, on behalf of, or for the use of a public entity shall be designed, constructed, or altered to be readily accessible to and usable by individuals with disabilities, is unchanged in the final rule, but has been redesignated as § 35.151(a)(1). The Department has added a new section, designated as § 35.151(a)(2), to provide that full compliance with the requirements of this section is not required where an entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features. This exception was contained in the title III regulation and in the 1991 Standards (applicable to both public accommodations and facilities used by public entities), so it has applied to any covered facility that was constructed under the 1991 Standards since the effective date of the ADA. The Department added it to the text of § 35.151 to maintain consistency between the design requirements that apply under title II and those that apply under title III. The Department received no significant comments about this section.

## Section 35.151(b) Alterations

The 1991 title II regulation does not contain any specific regulatory language comparable to the 1991 title III regulation relating to alterations and path of travel for covered entities, although the 1991 Standards describe standards for path of travel during alterations to a primary function. See 28 CFR part 36, app A., section 4.1.6(a) (2009).

The path of travel requirements contained in the title III regulation are based on section 303(a)(2) of the ADA, 42 U.S.C. 12183(a)(2), which provides that when an entity undertakes an alteration to a place of public accommodation or commercial facility that affects or could affect the usability of or access to an

area that contains a primary function, the entity shall ensure that, to the maximum extent feasible, the path of travel to the altered area—and the restrooms, telephones, and drinking fountains serving it—is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The NPRM proposed amending § 35.151 to add both the path of travel requirements and the exemption relating to barrier removal (as modified to apply to the program accessibility standard in title II) that are contained in the title III regulation to the title II regulation. Proposed § 35.151(b)(4) contained the requirements for path of travel. Proposed § 35.151(b)(2) stated that the path of travel requirements of § 35.151(b)(4) shall not apply to measures taken solely to comply with program accessibility requirements.

Where the specific requirements for path of travel apply under title III, they are limited to the extent that the cost and scope of alterations to the path of travel are disproportionate to the cost of the overall alteration, as determined under criteria established by the Attorney General.

The Access Board included the path of travel requirement for alterations to facilities covered by the standards (other than those subject to the residential facilities standards) in section 202.4 of 2004 ADAAG. Section 35.151(b)(4)(iii) of the final rule establishes the criteria for determining when the cost of alterations to the path of travel is “disproportionate” to the cost of the overall alteration.

The NPRM also provided that areas such as supply storage rooms, employee lounges and locker rooms, janitorial closets, entrances, and corridors are not areas containing a primary function. Nor are restroom areas considered to contain a primary function unless the provision of restrooms is a primary purpose of the facility, such as at a highway rest stop. In that situation, a restroom would be considered to be an “area containing a primary function” of the facility.

The Department is not changing the requirements for program accessibility. As provided in § 35.151(b)(2) of the regulation, the path of travel requirements of § 35.151(b)(4) only apply to alterations undertaken solely for purposes other than to meet the program accessibility requirements. The exemption for the specific path of travel requirement was included in the regulation to ensure that the specific requirements and disproportionality exceptions for path of travel are not applied when areas are being altered to meet the title II program accessibility requirements in § 35.150. In contrast, when areas are being altered to meet program accessibility requirements, they must comply with all of the applicable requirements referenced in section 202 of the 2010 Standards. A covered title II entity must provide accessibility to meet the requirements of § 35.150 unless doing so is an undue financial and administrative burden in accordance with § 35.150(a)(3). A covered title II entity may not use the disproportionality exception contained in the path of travel provisions as a defense to providing an accessible route as part of its obligation to provide program accessibility. The undue financial and administrative burden standard does not contain any bright line financial tests.

The Department's proposed § 35.151(b)(4) adopted the language now contained in § 36.403 of the title III regulation, including the disproportionality limitation (*i.e.*, alterations made to provide an accessible path of travel to the altered area would be deemed disproportionate to the overall alteration when the cost exceeds 20 percent of the cost of the alteration to the primary function area). Proposed § 35.151(b)(2) provided that the path of travel requirements do not apply to alterations undertaken solely to comply with program accessibility requirements.

The Department received a substantial number of comments objecting to the Department's adoption of the exemption for the path of travel requirements when alterations are undertaken solely to meet program accessibility requirements. These commenters argued that the Department had no statutory basis for providing this exemption nor does it serve any purpose. In addition, these commenters argued that the path of travel exemption has the effect of placing new limitations on the obligations to provide program

access. A number of commenters argued that doing away with the path of travel requirement would render meaningless the concept of program access. They argued that just as the requirement to provide an accessible path of travel to an altered area (regardless of the reason for the alteration), including making the restrooms, telephones, and drinking fountains that serve the altered area accessible, is a necessary requirement in other alterations, it is equally necessary for alterations made to provide program access. Several commenters expressed concern that a readily accessible path of travel be available to ensure that persons with disabilities can get to the physical location in which programs are held. Otherwise, they will not be able to access the public entity's service, program, or activity. Such access is a cornerstone of the protections provided by the ADA. Another commenter argued that it would be a waste of money to create an accessible facility without having a way to get to the primary area. This commenter also stated that the International Building Code (IBC) requires the path of travel to a primary function area, up to 20 percent of the cost of the project. Another commenter opposed the exemption, stating that the trigger of an alteration is frequently the only time that a facility must update its facilities to comply with evolving accessibility standards.

In the Department's view, the commenters objecting to the path of travel exemption contained in § 35.151(b)(2) did not understand the intention behind the exemption. The exemption was not intended to eliminate any existing requirements related to accessibility for alterations undertaken in order to meet program access obligations under § 35.149 and § 35.150. Rather, it was intended to ensure that covered entities did not apply the path of travel requirements in lieu of the overarching requirements in this Subpart that apply when making a facility accessible in order to comply with program accessibility. The exemption was also intended to make it clear that the disproportionality test contained in the path of travel standards is not applicable in determining whether providing program access results in an undue financial and administration burden within the meaning of § 35.150(a)(3). The exemption was also provided to maintain consistency with the title III path of travel exemption for barrier removal, see § 36.304(d), in keeping with the Department's regulatory authority under title II of the ADA. See 42 U.S.C. 12134(b); see also H. R Rep. No. 101-485, pt. 2, at 84 (1990) ("The committee intends, however, that the forms of discrimination prohibited by section 202 be identical to those set out in the applicable provisions of titles I and III of this legislation.").

For title II entities, the path of travel requirements are of significance in those cases where an alteration is being made solely for reasons other than program accessibility. For example, a public entity might have six courtrooms in two existing buildings and might determine that only three of those courtrooms and the public use and common use areas serving those courtrooms in one building are needed to be made accessible in order to satisfy its program access obligations. When the public entity makes those courtrooms and the public use and common use areas serving them accessible in order to meet its program access obligations, it will have to comply with the 2010 Standards unless the public entity can demonstrate that full compliance would result in undue financial and administrative burdens as described in § 35.150(a)(3). If such action would result in an undue financial or administrative burden, the public entity would nevertheless be required to take some other action that would not result in such an alteration or such burdens but would ensure that the benefits and services provided by the public entity are readily accessible to persons with disabilities. When the public entity is making modifications to meet its program access obligation, it may not rely on the path of travel exception under § 35.151(b)(4), which limits the requirement to those alterations where the cost and scope of the alterations are not disproportionate to the cost and scope of the overall alterations. If the public entity later decides to alter courtrooms in the other building, for purposes of updating the facility (and, as previously stated, has met its program access obligations) then in that case, the public entity would have to comply with the path of travel requirements in the 2010 Standards subject to the disproportionality exception set forth in § 35.151(b)(4).

The Department has slightly revised proposed § 35.151(b)(2) to make it clearer that the path of travel requirements only apply when alterations are undertaken solely for purposes other than program accessibility.

## Section 35.151(b)(4)(ii)(C) Path of travel—safe harbor

In § 35.151(b)(4)(ii)(C) of the NPRM, the Department included a provision that stated that public entities that have brought required elements of path of travel into compliance with the 1991 Standards are not required to retrofit those elements in order to reflect incremental changes in the 2010 Standards solely because of an alteration to a primary function area that is served by that path of travel. In these circumstances, the public entity is entitled to a safe harbor and is only required to modify elements to comply with the 2010 Standards if the public entity is planning an alteration to the element.

A substantial number of commenters objected to the Department's imposition of a safe harbor for alterations to facilities of public entities that comply with the 1991 Standards. These commenters argued that if a public entity is already in the process of altering its facility, there should be a legal requirement that individuals with disabilities be entitled to increased accessibility by using the 2010 Standards for path of travel work. They also stated that they did not believe there was a statutory basis for "grandfathering" facilities that comply with the 1991 Standards.

The ADA is silent on the issue of "grandfathering" or establishing a safe harbor for measuring compliance in situations where the covered entity is not undertaking a planned alteration to specific building elements. The ADA delegates to the Attorney General the responsibility for issuing regulations that define the parameters of covered entities' obligations when the statute does not directly address an issue. This regulation implements that delegation of authority.

One commenter proposed that a previous record of barrier removal be one of the factors in determining, prospectively, what renders a facility, when viewed in its entirety, usable and accessible to persons with disabilities. Another commenter asked the Department to clarify, at a minimum, that to the extent compliance with the 1991 Standards does not provide program access, particularly with regard to areas not specifically addressed in the 1991 Standards, the safe harbor will not operate to relieve an entity of its obligations to provide program access.

One commenter supported the proposal to add a safe harbor for path of travel.

The final rule retains the safe harbor for required elements of a path of travel to altered primary function areas for public entities that have already complied with the 1991 Standards with respect to those required elements. The Department believes that this safe harbor strikes an appropriate balance between ensuring that individuals with disabilities are provided access to buildings and facilities and potential financial burdens on existing public entities that are undertaking alterations subject to the 2010 Standards. This safe harbor is not a blanket exemption for facilities. If a public entity undertakes an alteration to a primary function area, only the required elements of a path of travel to that area that already comply with the 1991 Standards are subject to the safe harbor. If a public entity undertakes an alteration to a primary function area and the required elements of a path of travel to the altered area do not comply with the 1991 Standards, then the public entity must bring those elements into compliance with the 2010 Standards.

## Section 35.151(b)(3) Alterations to historic facilities

The final rule renumbers the requirements for alterations to historic facilities enumerated in current § 35.151(d)(1) and (2) as § 35.151(b)(3)(i) and (ii). Currently, the regulation provides that alterations to historic facilities shall comply to the maximum extent feasible with section 4.1.7 of UFAS or section 4.1.7 of the 1991 Standards. See 28 CFR 35.151(d)(1). Section 35.151(b)(3)(i) of the final rule eliminates the option of using UFAS for alterations that commence on or after March 15, 2012. The substantive requirement in current § 35.151(d)(2)—that alternative methods of access shall be provided pursuant to the requirements of § 35.150 if it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility—is contained in § 35.151(b)(3)(ii).

## Section 35.151(c) Accessibility standards for new construction and alterations

Section 35.151(c) of the NPRM proposed to adopt ADA Chapter 1, ADA Chapter 2, and Chapters 3 through 10 of the Americans with Disabilities Act and Architectural Barriers Act Guidelines (2004 ADAAG) into the ADA Standards for Accessible Design (2010 Standards). As the Department has noted, the development of these standards represents the culmination of a lengthy effort by the Access Board to update its guidelines, to make the Federal guidelines consistent to the extent permitted by law, and to harmonize the Federal requirements with the private sector model codes that form the basis of many State and local building code requirements. The full text of the 2010 Standards is available for public review on the ADA Home Page (<http://www.ada.gov>) and on the Access Board's Web site (<http://www.access-board.gov/gs.htm>) (last visited June 24, 2010). The Access Board site also includes an extensive discussion of the development of the 2004 ADA/ABA Guidelines, and a detailed comparison of the 1991 Standards, the 2004 ADA/ABA Guidelines, and the 2003 International Building Code.

Section 204 of the ADA, 42 U.S.C. 12134, directs the Attorney General to issue regulations to implement title II that are consistent with the minimum guidelines published by the Access Board. The Attorney General (or his designee) is a statutory member of the Access Board (see 29 U.S.C. 792(a)(1)(B(vii)) and was involved in the development of the 2004 ADAAG. Nevertheless, during the process of drafting the NPRM, the Department reviewed the 2004 ADAAG to determine if additional regulatory provisions were necessary. As a result of this review, the Department decided to propose new sections, which were contained in § 35.151(e)-(h) of the NPRM, to clarify how the Department will apply the proposed standards to social service center establishments, housing at places of education, assembly areas, and medical care facilities. Each of these provisions is discussed below.

Congress anticipated that there would be a need for close coordination of the ADA building requirements with State and local building code requirements. Therefore, the ADA authorized the Attorney General to establish an ADA code certification process under title III of the ADA. That process is addressed in 28 CFR part 36, subpart F. Revisions to that process are addressed in the regulation amending the title III regulation published elsewhere in the FEDERAL REGISTER today. In addition, the Department operates an extensive technical assistance program. The Department anticipates that once this rule is final, revised technical assistance material will be issued to provide guidance about its implementation.

Section 35.151(c) of the 1991 title II regulation establishes two standards for accessible new construction and alteration. Under paragraph (c), design, construction, or alteration of facilities in conformance with UFAS or with the 1991 Standards (which, at the time of the publication of the rule were also referred to as the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (1991 ADAAG)) is deemed to comply with the requirements of this section with respect to those facilities

(except that if the 1991 Standards are chosen, the elevator exemption does not apply). The 1991 Standards were based on the 1991 ADAAG, which was initially developed by the Access Board as guidelines for the accessibility of buildings and facilities that are subject to title III. The Department adopted the 1991 ADAAG as the standards for places of public accommodation and commercial facilities under title III of the ADA and it was published as Appendix A to the Department's regulation implementing title III, 56 FR 35592 (July 26, 1991) as amended, 58 FR 17522 (April 5, 1993), and as further amended, 59 FR 2675 (Jan. 18, 1994), codified at 28 CFR part 36 (2009).

Section 35.151(c) of the final rule adopts the 2010 Standards and establishes the compliance date and triggering events for the application of those standards to both new construction and alterations.

Appendix B of the final title III rule (Analysis and Commentary on the 2010 ADA Standards for Accessible Design) (which will be published today elsewhere in this volume and codified as Appendix B to 28 CFR part 36) provides a description of the major changes in the 2010 Standards (as compared to the 1991 ADAAG) and a discussion of the public comments that the Department received on specific sections of the 2004 ADAAG. A number of commenters asked the Department to revise certain provisions in the 2004 ADAAG in a manner that would reduce either the required scoping or specific technical accessibility requirements. As previously stated, although the ADA requires the enforceable standards issued by the Department under title II and title III to be consistent with the minimum guidelines published by the Access Board, it is the sole responsibility of the Attorney General to promulgate standards and to interpret and enforce those standards. The guidelines adopted by the Access Board are "minimum guidelines." 42 U.S.C. 12186(c).

**Compliance date.** When the ADA was enacted, the effective dates for various provisions were delayed in order to provide time for covered entities to become familiar with their new obligations. Titles II and III of the ADA generally became effective on January 26, 1992, six months after the regulations were published. See 42 U.S.C. 12131 note; 42 U.S.C. 12181 note. New construction under title II and alterations under either title II or title III had to comply with the design standards on that date. See 42 U.S.C. 12183(a)(1). For new construction under title III, the requirements applied to facilities designed and constructed for first occupancy after January 26, 1993—18 months after the 1991 Standards were published by the Department. In the NPRM, the Department proposed to amend § 35.151(c)(1) by revising the current language to limit the application of the 1991 standards to facilities on which construction commences within six months of the final rule adopting revised standards. The NPRM also proposed adding paragraph (c)(2) to § 35.151, which states that facilities on which construction commences on or after the date six months following the effective date of the final rule shall comply with the proposed standards adopted by that rule.

As a result, under the NPRM, for the first six months after the effective date, public entities would have the option to use either UFAS or the 1991 Standards and be in compliance with title II. Six months after the effective date of the rule, the new standards would take effect. At that time, construction in accordance with UFAS would no longer satisfy ADA requirements. The Department stated that in order to avoid placing the burden of complying with both standards on public entities, the Department would coordinate a government-wide effort to revise Federal agencies' section 504 regulations to adopt the 2004 ADAAG as the standard for new construction and alterations.

The purpose of the proposed six-month delay in requiring compliance with the 2010 Standards was to allow covered entities a reasonable grace period to transition between the existing and the proposed standards. For that reason, if a title II entity preferred to use the 2010 Standards as the standard for new construction or alterations commenced within the six-month period after the effective date of the final rule, such entity would be considered in compliance with title II of the ADA.

The Department received a number of comments about the proposed six-month effective date for the title II regulation that were similar in content to those received on this issue for the proposed title III regulation. Several commenters supported the six-month effective date. One commenter stated that any revisions to its State building code becomes effective six months after adoption and that this has worked well. In addition, this commenter stated that since 2004 ADAAG is similar to IBC 2006 and ICC/ANSI A117.1-2003, the transition should be easy. By contrast, another commenter advocated for a minimum 12-month effective date, arguing that a shorter effective date could cause substantial economic hardships to many cities and towns because of the lengthy lead time necessary for construction projects. This commenter was concerned that a six-month effective date could lead to projects having to be completely redrawn, rebid, and rescheduled to ensure compliance with the new standards. Other commenters advocated that the effective date be extended to at least 18 months after the publication of the rule. One of these commenters expressed concern that the kinds of bureaucratic organizations subject to the title II regulations lack the internal resources to quickly evaluate the regulatory changes, determine whether they are currently compliant with the 1991 standards, and determine what they have to do to comply with the new standards. The other commenter argued that 18 months is the minimum amount of time necessary to ensure that projects that have already been designed and approved do not have to undergo costly design revisions at taxpayer expense.

The Department is persuaded by the concerns raised by commenters for both the title II and III regulations that the six-month compliance date proposed in the NPRM for application of the 2010 Standards may be too short for certain projects that are already in the midst of the design and permitting process. The Department has determined that for new construction and alterations, compliance with the 2010 Standards will not be required until 18 months from the date the final rule is published. Until the time compliance with the 2010 Standards is required, public entities will have the option of complying with the 2010 Standards, the UFAS, or the 1991 Standards. However, public entities that choose to comply with the 2010 Standards in lieu of the 1991 Standards or UFAS prior to the compliance date described in this rule must choose one of the three standards, and may not rely on some of the requirements contained in one standard and some of the requirements contained in the other standards.

*Triggering event.* In § 35.151(c)(2) of the NPRM, the Department proposed that the commencement of construction serve as the triggering event for applying the proposed standards to new construction and alterations under title

- II. This language is consistent with the triggering event set forth in § 35.151(a) of the 1991 title II regulation. The Department received only four comments on this section of the title II rule. Three commenters supported the use of "start of construction" as the triggering event. One commenter argued that the Department should use the "last building permit or start of physical construction, whichever comes first," stating that "altering a design after a building permit has been issued can be an undue burden."

After considering these comments, the Department has decided to continue to use the commencement of physical construction as the triggering event for application of the 2010 Standards for entities covered by title II. The Department has also added clarifying language at § 35.151(c)(4) to the regulation to make it clear that the date of ceremonial groundbreaking or the date a structure is razed to make it possible for construction of a facility to take place does not qualify as the commencement of physical construction.

Section 234 of the 2010 Standards provides accessibility guidelines for newly designed and constructed amusement rides. The amusement ride provisions do not provide a "triggering event" for new construction or alteration of an amusement ride. An industry commenter requested that the

triggering event of “first use,” as noted in the Advisory note to section 234.1 of the 2004 ADAAG, be included in the final rule. The Advisory note provides that “[a] custom designed and constructed ride is new upon its first use, which is the first time amusement park patrons take the ride.” The Department declines to treat amusement rides differently than other types of new construction and alterations. Under the final rule, they are subject to § 35.151(c). Thus, newly constructed and altered amusement rides shall comply with the 2010 Standards if the start of physical construction or the alteration is on or after 18 months from the publication date of this rule. The Department also notes that section 234.4.2 of the 2010 Standards only applies where the structural or operational characteristics of an amusement ride are altered. It does not apply in cases where the only change to a ride is the theme.

*Noncomplying new construction and alterations.* The element-by-element safe harbor referenced in § 35.150(b)(2) has no effect on new or altered elements in existing facilities that were subject to the 1991 Standards or UFAS on the date that they were constructed or altered, but do not comply with the technical and scoping specifications for those elements in the 1991 Standards or UFAS. Section 35.151(c)(5) of the final rule sets forth the rules for noncompliant new construction or alterations in facilities that were subject to the requirements of this part. Under those provisions, noncomplying new construction and alterations constructed or altered after the effective date of the applicable ADA requirements and before March 15, 2012 shall, before March 15, 2012, be made accessible in accordance with either the 1991 Standards, UFAS, or the 2010 Standards. Noncomplying new construction and alterations constructed or altered after the effective date of the applicable ADA requirements and before March 15, 2012, shall, on or after March 15, 2012 be made accessible in accordance with the 2010 Standards.

## Section 35.151(d) Scope of coverage

In the NPRM, the Department proposed a new provision, § 35.151(d), to clarify that the requirements established by § 35.151, including those contained in the 2004 ADAAG, prescribe what is necessary to ensure that buildings and facilities, including fixed or built-in elements in new or altered facilities, are accessible to individuals with disabilities. Once the construction or alteration of a facility has been completed, all other aspects of programs, services, and activities conducted in that facility are subject to the operational requirements established in this final rule. Although the Department may use the requirements of the 2010 Standards as a guide to determining when and how to make equipment and furnishings accessible, those determinations fall within the discretionary authority of the Department.

The Department also wishes to clarify that the advisory notes, appendix notes, and figures that accompany the 1991 and 2010 Standards do not establish separately enforceable requirements unless specifically stated otherwise in the text of the standards. This clarification has been made to address concerns expressed by ANPRM commenters who mistakenly believed that the advisory notes in the 2004 ADAAG established requirements beyond those established in the text of the guidelines (e.g., Advisory 504.4 suggests, but does not require, that covered entities provide visual contrast on stair tread nosing to make them more visible to individuals with low vision). The Department received no significant comments on this section and it is unchanged in the final rule.

*Definitions of residential facilities and transient lodging.* The 2010 Standards add a definition of “residential dwelling unit” and modify the current definition of “transient lodging.” Under section 106.5 of the 2010 Standards, “residential dwelling unit” is defined as “[a] unit intended to be used as a residence, that is primarily long-term in nature” and does not include transient lodging, inpatient medical care, licensed long-term care, and detention or correctional facilities. Additionally, section 106.5 of the 2010 Standards

changes the definition of "transient lodging" to a building or facility "containing one or more guest room(s) for sleeping that provides accommodations that are primarily short-term in nature." "Transient lodging" does not include residential dwelling units intended to be used as a residence. The references to "dwelling units" and "dormitories" that are in the definition of the 1991 Standards are omitted from the 2010 Standards.

The comments about the application of transient lodging or residential standards to social service center establishments, and housing at a place of education are addressed separately below. The Department received one additional comment on this issue from an organization representing emergency response personnel seeking an exemption from the transient lodging accessibility requirements for crew quarters and common use areas serving those crew quarters (e.g., locker rooms, exercise rooms, day room) that are used exclusively by on-duty emergency response personnel and that are not used for any public purpose. The commenter argued that since emergency response personnel must meet certain physical qualifications that have the effect of exempting persons with mobility disabilities, there is no need to build crew quarters and common use areas serving those crew quarters to meet the 2004 ADAAG. In addition, the commenter argued that applying the transient lodging standards would impose significant costs and create living space that is less usable for most emergency response personnel.

The ADA does not exempt spaces because of a belief or policy that excludes persons with disabilities from certain work. However, the Department believes that crew quarters that are used exclusively as a residence by emergency response personnel and the kitchens and bathrooms exclusively serving those quarters are more like residential dwelling units and are therefore covered by the residential dwelling standards in the 2010 Standards, not the transient lodging standards. The residential dwelling standards address most of the concerns of the commenter. For example, the commenter was concerned that sinks in kitchens and lavatories in bathrooms that are accessible under the transient lodging standards would be too low to be comfortably used by emergency response personnel. The residential dwelling standards allow such features to be adaptable so that they would not have to be lowered until accessibility was needed. Similarly, grab bars and shower seats would not have to be installed at the time of construction provided that reinforcement has been installed in walls and located so as to permit their installation at a later date.

## Section 35.151(e) Social service center establishments

In the NPRM, the Department proposed a new § 35.151(e) requiring group homes, halfway houses, shelters, or similar social service center establishments that provide temporary sleeping accommodations or residential dwelling units to comply with the provisions of the 2004 ADAAG that apply to residential facilities, including, but not limited to, the provisions in sections 233 and 809.

The NPRM explained that this proposal was based on two important changes in the 2004 ADAAG. First, for the first time, residential dwelling units are explicitly covered in the 2004 ADAAG in section 233. Second, the 2004 ADAAG eliminates the language contained in the 1991 Standards addressing scoping and technical requirements for homeless shelters, group homes, and similar social service center establishments. Currently, such establishments are covered in section 9.5 of the transient lodging section of the 1991 Standards. The deletion of section 9.5 creates an ambiguity of coverage that must be addressed.

The NPRM explained the Department's belief that transferring coverage of social service center establishments from the transient lodging standards to the residential facilities standards would alleviate conflicting requirements for social service center providers. The Department believes that a substantial

percentage of social service center establishments are recipients of Federal financial assistance from the Department of Housing and Urban Development (HUD). The Department of Health and Human Services (HHS) also provides financial assistance for the operation of shelters through the Administration for Children and Families programs. As such, these establishments are covered both by the ADA and section 504 of the Rehabilitation Act. UFAS is currently the design standard for new construction and alterations for entities subject to section 504. The two design standards for accessibility—the 1991 Standards and UFAS—have confronted many social service providers with separate, and sometimes conflicting, requirements for design and construction of facilities. To resolve these conflicts, the residential facilities standards in the 2004 ADAAG have been coordinated with the section 504 requirements. The transient lodging standards, however, are not similarly coordinated. The deletion of section 9.5 of the 1991 Standards from the 2004 ADAAG presented two options: (1) Require coverage under the transient lodging standards, and subject such facilities to separate, conflicting requirements for design and construction; or (2) require coverage under the residential facilities standards, which would harmonize the regulatory requirements under the ADA and section 504. The Department chose the option that harmonizes the regulatory requirements: coverage under the residential facilities standards.

In the NPRM, the Department expressed concern that the residential facilities standards do not include a requirement for clear floor space next to beds similar to the requirement in the transient lodging standards and as a result, the Department proposed adding a provision that would require certain social service center establishments that provide sleeping rooms with more than 25 beds to ensure that a minimum of 5 percent of the beds have clear floor space in accordance with section 806.2.3 or of the 2004 ADAAG.

In the NPRM, the Department requested information from providers who operate homeless shelters, transient group homes, halfway houses, and other social service center establishments, and from the clients of these facilities who would be affected by this proposed change, asking, “[t]o what extent have conflicts between the ADA and section 504 affected these facilities? What would be the effect of applying the residential dwelling unit requirements to these facilities, rather than the requirements for transient lodging guest rooms?” 73 FR 34466, 34491 (June 17, 2008).

Many of the commenters supported applying the residential facilities requirements to social service center establishments, stating that even though the residential facilities requirements are less demanding in some instances, the existence of one clear standard will result in an overall increased level of accessibility by eliminating the confusion and inaction that are sometimes caused by the current existence of multiple requirements. One commenter also stated that “it makes sense to treat social service center establishments like residential facilities because this is how these establishments function in practice.”

Two commenters agreed with applying the residential facilities requirements to social service center establishments but recommended adding a requirement for various bathing options, such as a roll-in shower (which is not required under the residential standards).

One commenter objected to the change and asked the Department to require that social service center establishments continue to comply with the transient lodging standards. One commenter stated that it did not agree that the standards for residential coverage would serve persons with disabilities as well as the 1991 transient lodging standards. This commenter expressed concern that the Department had eliminated guidance for social service agencies and that the rule should be put on hold until those safeguards are restored. Another commenter argued that the rule that would provide the greatest access for persons with disabilities should prevail.

Several commenters argued for the application of the transient lodging standards to all social service center establishments except those that were “intended as a person's place of abode,” referencing the Department's question related to the definition of “place of lodging” in the title III NPRM. One commenter stated that the International Building Code requires accessible units in all transient facilities. The commenter expressed concern that group homes should be built to be accessible, rather than adaptable.

The Department continues to be concerned about alleviating the challenges for social service providers that are also subject to section 504 and would likely be subject to conflicting requirements if the transient lodging standards were applied. Thus, the Department has retained the requirement that social service center establishments comply with the residential dwelling standards. The Department believes, however, that social service center establishments that provide emergency shelter to large transient populations should be able to provide bathing facilities that are accessible to persons with mobility disabilities who need roll-in showers. Because of the transient nature of the population of these large shelters, it will not be feasible to modify bathing facilities in a timely manner when faced with a need to provide a roll-in shower with a seat when requested by an overnight visitor. As a result, the Department has added a requirement that social service center establishments with sleeping accommodations for more than 50 individuals must provide at least one roll-in shower with a seat that complies with the relevant provisions of section 608 of the 2010 Standards. Transfer-type showers are not permitted in lieu of a roll-in shower with a seat and the exceptions in sections 608.3 and 608.4 for residential dwelling units are not permitted. When separate shower facilities are provided for men and for women, at least one roll-in shower shall be provided for each group. This supplemental requirement to the residential facilities standards is in addition to the supplemental requirement that was proposed in the NPRM for clear floor space in sleeping rooms with more than 25 beds.

The Department also notes that while dwelling units at some social service center establishments are also subject to the Fair Housing Act (FHAct) design and construction requirements that require certain features of adaptable and accessible design, FHAct units do not provide the same level of accessibility that is required for residential facilities under the 2010 Standards. The FHAct requirements, where also applicable, should not be considered a substitute for the 2010 Standards. Rather, the 2010 Standards must be followed in addition to the FHAct requirements.

The Department also notes that whereas the NPRM used the term “social service establishment,” the final rule uses the term “social service center establishment.” The Department has made this editorial change so that the final rule is consistent with the terminology used in the ADA. See 42 U.S.C. 12181(7)(k).

## Section 35.151(f) Housing at a place of education

The Department of Justice and the Department of Education share responsibility for regulation and enforcement of the ADA in postsecondary educational settings, including its requirements for architectural features. In addition, the Department of Housing and Urban Development (HUD) has enforcement responsibility for housing subject to title II of the ADA. Housing facilities in educational settings range from traditional residence halls and dormitories to apartment or townhouse-style residences. In addition to title II of the ADA, public universities and schools that receive Federal financial assistance are also subject to section 504, which contains its own accessibility requirements through the application of UFAS. Residential housing in an educational setting is also covered by the FHAct, which requires newly constructed multifamily housing to include certain features of accessible and adaptable design. Covered entities subject to the ADA must always be aware of, and comply with, any other Federal statutes or regulations that govern the operation of residential properties.

Although the 1991 Standards mention dormitories as a form of transient lodging, they do not specifically address how the ADA applies to dormitories or other types of residential housing provided in an educational setting. The 1991 Standards also do not contain any specific provisions for residential facilities, allowing covered entities to elect to follow the residential standards contained in UFAS.

Although the 2004 ADAAG contains provisions for both residential facilities and transient lodging, the guidelines do not indicate which requirements apply to housing provided in an educational setting, leaving it to the adopting agencies to make that choice. After evaluating both sets of standards, the Department concluded that the benefits of applying the transient lodging standards outweighed the benefits of applying the residential facilities standards. Consequently, in the NPRM, the Department proposed a new § 35.151(f) that provided that residence halls or dormitories operated by or on behalf of places of education shall comply with the provisions of the proposed standards for transient lodging, including, but not limited to, the provisions in sections 224 and 806 of the 2004 ADAAG.

Both public and private school housing facilities have varied characteristics. College and university housing facilities typically provide housing for up to one academic year, but may be closed during school vacation periods. In the summer, they are often used for short-term stays of one to three days, a week, or several months. Graduate and faculty housing is often provided year-round in the form of apartments, which may serve individuals or families with children. These housing facilities are diverse in their layout. Some are double-occupancy rooms with a shared toilet and bathing room, which may be inside or outside the unit. Others may contain cluster, suite, or group arrangements where several rooms are located inside a defined unit with bathing, kitchen, and similar common facilities. In some cases, these suites are indistinguishable in features from traditional apartments. Universities may build their own housing facilities or enter into agreements with private developers to build, own, or lease housing to the educational institution or to its students. Academic housing may be located on the campus of the university or may be located in nearby neighborhoods.

Throughout the school year and the summer, academic housing can become program areas in which small groups meet, receptions and educational sessions are held, and social activities occur. The ability to move between rooms—both accessible rooms and standard rooms—in order to socialize, to study, and to use all public use and common use areas is an essential part of having access to these educational programs and activities. Academic housing is also used for short-term transient educational programs during the time students are not in regular residence and may be rented out to transient visitors in a manner similar to a hotel for special university functions.

The Department was concerned that applying the new construction requirements for residential facilities to educational housing facilities could hinder access to educational programs for students with disabilities. Elevators are not generally required under the 2004 ADAAG residential facilities standards unless they are needed to provide an accessible route from accessible units to public use and common use areas, while under the 2004 ADAAG as it applies to other types of facilities, multistory public facilities must have elevators unless they meet very specific exceptions. In addition, the residential facilities standards do not require accessible roll-in showers in bathrooms, while the transient lodging requirements require some of the accessible units to be served by bathrooms with roll-in showers. The transient lodging standards also require that a greater number of units have accessible features for persons with communication disabilities. The transient lodging standards provide for installation of the required accessible features so that they are available immediately, but the residential facilities standards allow for certain features of the unit to be adaptable. For example, only reinforcements for grab bars need to be provided in residential dwellings, but the actual grab bars must be installed under the transient lodging standards. By contrast, the residential facilities standards do require certain features that provide greater accessibility within units, such as more usable kitchens, and an accessible route throughout the

dwelling. The residential facilities standards also require 5 percent of the units to be accessible to persons with mobility disabilities, which is a continuation of the same scoping that is currently required under UFAS, and is therefore applicable to any educational institution that is covered by section 504. The transient lodging standards require a lower percentage of accessible sleeping rooms for facilities with large numbers of rooms than is required by UFAS. For example, if a dormitory had 150 rooms, the transient lodging standards would require seven accessible rooms while the residential standards would require eight. In a large dormitory with 500 rooms, the transient lodging standards would require 13 accessible rooms and the residential facilities standards would require 25. There are other differences between the two sets of standards as well with respect to requirements for accessible windows, alterations, kitchens, accessible route throughout a unit, and clear floor space in bathrooms allowing for a side transfer.

In the NPRM, the Department requested public comment on how to scope educational housing facilities, asking, “[w]ould the residential facility requirements or the transient lodging requirements in the 2004 ADAAG be more appropriate for housing at places of education? How would the different requirements affect the cost when building new dormitories and other student housing?” 73 FR 34466, 34492 (June 17, 2008).

The vast majority of the comments received by the Department advocated using the residential facilities standards for housing at a place of education instead of the transient lodging standards, arguing that housing at places of public education are in fact homes for the students who live in them. These commenters argued, however, that the Department should impose a requirement for a variety of options for accessible bathing and should ensure that all floors of dormitories be accessible so that students with disabilities have the same opportunities to participate in the life of the dormitory community that are provided to students without disabilities. Commenters representing persons with disabilities and several individuals argued that, although the transient lodging standards may provide a few more accessible features (such as roll-in showers), the residential facilities standards would ensure that students with disabilities have access to all rooms in their assigned unit, not just to the sleeping room, kitchenette, and wet bar. One commenter stated that, in its view, the residential facilities standards were congruent with overlapping requirements from HUD, and that access provided by the residential facilities requirements within alterations would ensure dispersion of accessible features more effectively. This commenter also argued that while the increased number of required accessible units for residential facilities as compared to transient lodging may increase the cost of construction or alteration, this cost would be offset by a reduced need to adapt rooms later if the demand for accessible rooms exceeds the supply. The commenter also encouraged the Department to impose a visitability (accessible doorways and necessary clear floor space for turning radius) requirement for both the residential facilities and transient lodging requirements to allow students with mobility impairments to interact and socialize in a fully integrated fashion.

Two commenters supported the Department's proposed approach. One commenter argued that the transient lodging requirements in the 2004 ADAAG would provide greater accessibility and increase the opportunity of students with disabilities to participate fully in campus life. A second commenter generally supported the provision of accessible dwelling units at places of education, and pointed out that the relevant scoping in the International Building Code requires accessible units “consistent with hotel accommodations.”

The Department has considered the comments recommending the use of the residential facilities standards and acknowledges that they require certain features that are not included in the transient lodging standards and that should be required for housing provided at a place of education. In addition, the Department notes that since educational institutions often use their academic housing facilities as

short-term transient lodging in the summers, it is important that accessible features be installed at the outset. It is not realistic to expect that the educational institution will be able to adapt a unit in a timely manner in order to provide accessible accommodations to someone attending a one-week program during the summer.

The Department has determined that the best approach to this type of housing is to continue to require the application of transient lodging standards, but at the same time to add several requirements drawn from the residential facilities standards related to accessible turning spaces and work surfaces in kitchens, and the accessible route throughout the unit. This will ensure the maintenance of the transient lodging standard requirements related to access to all floors of the facility, roll-in showers in facilities with more than 50 sleeping rooms, and other important accessibility features not found in the residential facilities standards, but will also ensure usable kitchens and access to all the rooms in a suite or apartment.

The Department has added a new definition to § 35.104, "Housing at a Place of Education," and has revised § 35.151(f) to reflect the accessible features that now will be required in addition to the requirements set forth under the transient lodging standards. The Department also recognizes that some educational institutions provide some residential housing on a year-round basis to graduate students and staff which is comparable to private rental housing, and which contains no facilities for educational programming. Section 35.151(f)(3) exempts from the transient lodging standards apartments or townhouse facilities provided by or on behalf of a place of education that are leased on a year-round basis exclusively to graduate students or faculty, and do not contain any public use or common use areas available for educational programming; instead, such housing shall comply with the requirements for residential facilities in sections 233 and 809 of the 2010 Standards.

Section 35.151(f) uses the term "sleeping room" in lieu of the term "guest room," which is the term used in the transient lodging standards. The Department is using this term because it believes that, for the most part, it provides a better description of the sleeping facilities used in a place of education than "guest room." The final rule states that the Department intends the terms to be used interchangeably in the application of the transient lodging standards to housing at a place of education.

## Section 35.151(g) Assembly areas

In the NPRM, the Department proposed § 35.151(g) to supplement the assembly area requirements of the 2004 ADAAG, which the Department is adopting as part of the 2010 Standards. The NPRM proposed at § 35.151(g)(1) to require wheelchair spaces and companion seating locations to be dispersed to all levels of the facility and are served by an accessible route. The Department received no significant comments on this paragraph and has decided to adopt the proposed language with minor modifications. The Department has retained the substance of this section in the final rule but has clarified that the requirement applies to stadiums, arenas, and grandstands. In addition, the Department has revised the phrase "wheelchair and companion seating locations" to "wheelchair spaces and companion seats."

Section 35.151(g)(1) ensures that there is greater dispersion of wheelchair spaces and companion seats throughout stadiums, arenas, and grandstands than would otherwise be required by sections 221 and 802 of the 2004 ADAAG. In some cases, the accessible route may not be the same route that other individuals use to reach their seats. For example, if other patrons reach their seats on the field by an inaccessible route (e.g., by stairs), but there is an accessible route that complies with section 206.3 of the 2010 Standards that could be connected to seats on the field, wheelchair spaces and companion seats must be placed on the field even if that route is not generally available to the public.

Regulatory language that was included in the 2004 ADAAG advisory, but that did not appear in the NPRM, has been added by the Department in § 35.151(g)(2). Section 35.151(g)(2) now requires an assembly area that has seating encircling, in whole or in part, a field of play or performance area such as an arena or stadium, to place wheelchair spaces and companion seats around the entire facility. This rule, which is designed to prevent a public entity from placing wheelchair spaces and companion seats on one side of the facility only, is consistent with the Department's enforcement practices and reflects its interpretation of section 4.33.3 of the 1991 Standards.

In the NPRM, the Department proposed § 35.151(g)(2) which prohibits wheelchair spaces and companion seating locations from being "located on, (or obstructed by) temporary platforms or other moveable structures." Through its enforcement actions, the Department discovered that some venues place wheelchair spaces and companion seats on temporary platforms that, when removed, reveal conventional seating underneath, or cover the wheelchair spaces and companion seats with temporary platforms on top of which they place risers of conventional seating. These platforms cover groups of conventional seats and are used to provide groups of wheelchair seats and companion seats.

Several commenters requested an exception to the prohibition of the use of temporary platforms for public entities that sell most of their tickets on a season-ticket or other multi-event basis. Such commenters argued that they should be able to use temporary platforms because they know, in advance, that the patrons sitting in certain areas for the whole season do not need wheelchair spaces and companion seats. The Department declines to adopt such an exception. As it explained in detail in the NPRM, the Department believes that permitting the use of movable platforms that seat four or more wheelchair users and their companions have the potential to reduce the number of available wheelchair seating spaces below the level required, thus reducing the opportunities for persons who need accessible seating to have the same choice of ticket prices and amenities that are available to other patrons in the facility. In addition, use of removable platforms may result in instances where last minute requests for wheelchair and companion seating cannot be met because entire sections of accessible seating will be lost when a platform is removed. See 73 FR 34466, 34493 (June 17, 2008). Further, use of temporary platforms allows facilities to limit persons who need accessible seating to certain seating areas, and to relegate accessible seating to less desirable locations. The use of temporary platforms has the effect of neutralizing dispersion and other seating requirements (e.g., line of sight) for wheelchair spaces and companion seats. Cf. *Independent Living Resources v. Oregon Arena Corp.*, 1 F. Supp. 2d 1159, 1171 (D. Or. 1998) (holding that while a public accommodation may "infill" wheelchair spaces with removable seats when the wheelchair spaces are not needed to accommodate individuals with disabilities, under certain circumstances "[s]uch a practice might well violate the rule that wheelchair spaces must be dispersed throughout the arena in a manner that is roughly proportionate to the overall distribution of seating"). In addition, using temporary platforms to convert unsold wheelchair spaces to conventional seating undermines the flexibility facilities need to accommodate secondary ticket markets exchanges as required by § 35.138(g) of the final rule.

As the Department explained in the NPRM, however, this provision was not designed to prohibit temporary seating that increases seating for events (e.g., placing temporary seating on the floor of a basketball court for a concert). Consequently, the final rule, at § 35.151(g)(3), has been amended to clarify that if an entire seating section is on a temporary platform for a particular event, then wheelchair spaces and companion seats may be in that seating section. However, adding a temporary platform to create wheelchair spaces and companion seats that are otherwise dissimilar from nearby fixed seating and then simply adding a small number of additional seats to the platform would not qualify as an "entire seating section" on the platform. In addition, § 35.151(g)(3) clarifies that facilities may fill in wheelchair spaces with removable seats when the wheelchair spaces are not needed by persons who use wheelchairs.

The Department has been responsive to assembly areas' concerns about reduced revenues due to unused accessible seating. Accordingly, the Department has reduced scoping requirements significantly—by almost half in large assembly areas—and determined that allowing assembly areas to infill unsold wheelchair spaces with readily removable temporary individual seats appropriately balances their economic concerns with the rights of individuals with disabilities. See section 221.2 of the 2010 Standards.

For stadium-style movie theaters, in § 35.151(g)(4) of the NPRM the Department proposed requiring placement of wheelchair seating spaces and companion seats on a riser or cross-aisle in the stadium section of the theater and placement of such seating so that it satisfies at least one of the following criteria: (1) It is located within the rear 60 percent of the seats provided in the auditorium; or (2) it is located within the area of the auditorium where the vertical viewing angles are between the 40th to 100th percentile of vertical viewing angles for all seats in that theater as ranked from the first row (1st percentile) to the back row (100th percentile). The vertical viewing angle is the angle between a horizontal line perpendicular to the seated viewer's eye to the screen and a line from the seated viewer's eye to the top of the screen.

The Department proposed this bright-line rule for two reasons: (1) The movie theater industry petitioned for such a rule; and (2) the Department has acquired expertise on the design of stadium style theaters from litigation against several major movie theater chains. See *U.S. v. AMC Entertainment*, 232 F. Supp. 2d 1092 (C.D. Ca. 2002), *rev'd in part*, 549 F. 3d 760 (9th Cir. 2008); *U.S. v. Cinemark USA, Inc.*, 348 F. 3d 569 (6th Cir. 2003), *cert. denied*, 542 U.S. 937 (2004). Two industry commenters—at least one of whom otherwise supported this rule—requested that the Department explicitly state that this rule does not apply retroactively to existing theaters. Although this rule on its face applies to new construction and alterations, these commenters were concerned that the rule could be interpreted to apply retroactively because of the Department's statement in the ANPRM that this bright-line rule, although newly-articulated, does not represent a "substantive change from the existing line-of-sight requirements" of section 4.33.3 of the 1991 Standards. See 69 FR 58768, 58776 (Sept. 30, 2004).

Although the Department intends for § 35.151(g)(4) of this rule to apply prospectively to new construction and alterations, this rule is not a departure from, and is consistent with, the line-of-sight requirements in the 1991 Standards. The Department has always interpreted the line-of-sight requirements in the 1991 Standards to require viewing angles provided to patrons who use wheelchairs to be comparable to those afforded to other spectators. Section 35.151(g)(4) merely represents the application of these requirements to stadium-style movie theaters.

One commenter from a trade association sought clarification whether § 35.151(g)(4) applies to stadium-style theaters with more than 300 seats, and argued that it should not since dispersion requirements apply in those theaters. The Department declines to limit this rule to stadium-style theaters with 300 or fewer seats; stadium-style theaters of all sizes must comply with this rule. So, for example, stadium-style theaters that must vertically disperse wheelchair and companion seats must do so within the parameters of this rule.

The NPRM included a provision that required assembly areas with more than 5,000 seats to provide at least five wheelchair spaces with at least three companion seats for each of those five wheelchair spaces. The Department agrees with commenters who asserted that group seating is better addressed through ticketing policies rather than design and has deleted that provision from this section of the final rule.

## Section 35.151(h) Medical care facilities

In the 1991 title II regulation, there was no provision addressing the dispersion of accessible sleeping rooms in medical care facilities. The Department is aware, however, of problems that individuals with disabilities face in receiving full and equal medical care when accessible sleeping rooms are not adequately dispersed. When accessible rooms are not fully dispersed, a person with a disability is often placed in an accessible room in an area that is not medically appropriate for his or her condition, and is thus denied quick access to staff with expertise in that medical specialty and specialized equipment. While the Access Board did not establish specific design requirements for dispersion in the 2004 ADAAG, in response to extensive comments in support of dispersion it added an advisory note, Advisory 223.1 General, encouraging dispersion of accessible rooms within the facility so that accessible rooms are more likely to be proximate to appropriate qualified staff and resources.

In the NPRM, the Department sought additional comment on the issue, asking whether it should require medical care facilities, such as hospitals, to disperse their accessible sleeping rooms, and if so, by what method (by specialty area, floor, or other criteria). All of the comments the Department received on this issue supported dispersing accessible sleeping rooms proportionally by specialty area. These comments, from individuals, organizations, and a building code association, argued that it would not be difficult for hospitals to disperse rooms by specialty area, given the high level of regulation to which hospitals are subject and the planning that hospitals do based on utilization trends. Further, commenters suggested that without a requirement, it is unlikely that hospitals would disperse the rooms. In addition, concentrating accessible rooms in one area perpetuates segregation of individuals with disabilities, which is counter to the purpose of the ADA.

The Department has decided to require medical care facilities to disperse their accessible sleeping rooms in a manner that is proportionate by type of medical specialty. This does not require exact mathematical proportionality, which at times would be impossible. However, it does require that medical care facilities disperse their accessible rooms by medical specialty so that persons with disabilities can, to the extent practical, stay in an accessible room within the wing or ward that is appropriate for their medical needs. The language used in this rule ("in a manner that is proportionate by type of medical specialty") is more specific than that used in the NPRM ("in a manner that enables patients with disabilities to have access to appropriate specialty services") and adopts the concept of proportionality proposed by the commenters. Accessible rooms should be dispersed throughout all medical specialties, such as obstetrics, orthopedics, pediatrics, and cardiac care.

## Section 35.151(i) Curb ramps

Section 35.151(e) on curb ramps in the 1991 rule has been redesignated as § 35.151(i). In the NPRM, the Department proposed making a minor editorial change to this section, deleting the phrase "other sloped areas" from the two places in which it appears in the 1991 title II regulation. In the NPRM, the Department stated that the phrase "other sloped areas" lacks technical precision. The Department received no significant public comments on this proposal. Upon further consideration, however, the Department has concluded that the regulation should acknowledge that there are times when there are transitions from sidewalk to road surface that do not technically qualify as "curb ramps" (sloped surfaces that have a running slope that exceed 5 percent). Therefore, the Department has decided not to delete the phrase "other sloped areas."

## Section 35.151(j) Residential housing for sale to individual owners

Although public entities that operate residential housing programs are subject to title II of the ADA, and therefore must provide accessible residential housing, the 1991 Standards did not contain scoping or technical standards that specifically applied to residential housing units. As a result, under the Department's title II regulation, these agencies had the choice of complying with UFAS, which contains specific scoping and technical standards for residential housing units, or applying the ADAAG transient lodging standards to their housing. Neither UFAS nor the 1991 Standards distinguish between residential housing provided for rent and those provided for sale to individual owners. Thus, under the 1991 title II regulation, public entities that construct residential housing units to be sold to individual owners must ensure that some of those units are accessible. This requirement is in addition to any accessibility requirements imposed on housing programs operated by public entities that receive Federal financial assistance from Federal agencies such as HUD.

The 2010 Standards contain scoping and technical standards for residential dwelling units. However, section 233.3.2 of the 2010 Standards specifically defers to the Department and to HUD, the standard-setting agency under the ABA, to decide the appropriate scoping for those residential dwelling units built by or on behalf of public entities with the intent that the finished units will be sold to individual owners. These programs include, for example, HUD's public housing and HOME programs as well as State-funded programs to construct units for sale to individuals. In the NPRM, the Department did not make a specific proposal for this scoping. Instead, the Department stated that after consultation and coordination with HUD, the Department would make a determination in the final rule. The Department also sought public comment on this issue stating that "[t]he Department would welcome recommendations from individuals with disabilities, public housing authorities, and other interested parties that have experience with these programs. Please comment on the appropriate scoping for residential dwelling units built by or on behalf of public entities with the intent that the finished units will be sold to individual owners." 73 FR 34466, 34492 (June 17, 2008).

All of the public comments received by the Department in response to this question were supportive of the Department's ensuring that the residential standards apply to housing built on behalf of public entities with the intent that the finished units would be sold to individual owners. The vast majority of commenters recommended that the Department require that projects consisting of five or more units, whether or not the units are located on one or multiple locations, comply with the 2004 ADAAG requirements for scoping of residential units, which require that 5 percent, and no fewer than one, of the dwelling units provide mobility features, and that 2 percent, and no fewer than one, of the dwelling units provide communication features. See 2004 ADAAG Section 233.3. These commenters argued that the Department should not defer to HUD because HUD has not yet adopted the 2004 ADAAG and there is ambiguity on the scope of coverage of pre-built for sale units under HUD's current section 504 regulations. In addition, these commenters expressed concern that HUD's current regulation, 24 CFR 8.29, presumes that a prospective buyer is identified before design and construction begins so that disability features can be incorporated prior to construction. These commenters stated that State and Federally funded homeownership programs typically do not identify prospective buyers before construction has commenced. One commenter stated that, in its experience, when public entities build accessible for-sale units, they often sell these units through a lottery system that does not make any effort to match persons who need the accessible features with the units that have those features. Thus, accessible units are often sold to persons without disabilities. This commenter encouraged the Department to make sure that accessible for-sale units built or funded by public entities are placed in a separate lottery restricted to income-eligible persons with disabilities.

Two commenters recommended that the Department develop rules for four types of for-sale projects: single family pre-built (where buyer selects the unit after construction), single family post-built (where the buyer chooses the model prior to its construction), multi-family pre-built, and multi-family post-built. These commenters recommended that the Department require pre-built units to comply with the 2004 ADAAG 233.1 scoping requirements. For post-built units, the commenters recommended that the Department require all models to have an alternate design with mobility features and an alternate design with communications features in compliance with 2004 ADAAG. Accessible models should be available at no extra cost to the buyer. One commenter recommended that, in addition to required fully accessible units, all ground floor units should be readily convertible for accessibility or for sensory impairments technology enhancements.

The Department believes that consistent with existing requirements under title II, housing programs operated by public entities that design and construct or alter residential units for sale to individual owners should comply with the 2010 Standards, including the requirements for residential facilities in sections 233 and 809. These requirements will ensure that a minimum of 5 percent of the units, but no fewer than one unit, of the total number of residential dwelling units will be designed and constructed to be accessible for persons with mobility disabilities. At least 2 percent, but no fewer than one unit, of the total number of residential dwelling units shall provide communication features.

The Department recognizes that there are some programs (such as the one identified by the commenter), in which units are not designed and constructed until an individual buyer is identified. In such cases, the public entity is still obligated to comply with the 2010 Standards. In addition, the public entity must ensure that pre-identified buyers with mobility disabilities and visual and hearing disabilities are afforded the opportunity to buy the accessible units. Once the program has identified buyers who need the number of accessible units mandated by the 2010 Standards, it may have to make reasonable modifications to its policies, practices, and procedures in order to provide accessible units to other buyers with disabilities who request such units.

The Department notes that the residential facilities standards allow for construction of units with certain features of adaptability. Public entities that are concerned that fully accessible units are less marketable may choose to build these units to include the allowable adaptable features, and then adapt them at their own expense for buyers with mobility disabilities who need accessible units. For example, features such as grab bars are not required but may be added by the public entity if needed by the buyer at the time of purchase and cabinets under sinks may be designed to be removable to allow access to the required knee space for a forward approach.

The Department agrees with the commenters that covered entities may have to make reasonable modifications to their policies, practices, and procedures in order to ensure that when they offer pre-built accessible residential units for sale, the units are offered in a manner that gives access to those units to persons with disabilities who need the features of the units and who are otherwise eligible for the housing program. This may be accomplished, for example, by adopting preferences for accessible units for persons who need the features of the units, holding separate lotteries for accessible units, or other suitable methods that result in the sale of accessible units to persons who need the features of such units. In addition, the Department believes that units designed and constructed or altered that comply with the requirements for residential facilities and are offered for sale to individuals must be provided at the same price as units without such features.

## Section 35.151(k) Detention and correctional facilities

The 1991 Standards did not contain specific accessibility standards applicable to cells in correctional facilities. However, correctional and detention facilities operated by or on behalf of public entities have always been subject to the nondiscrimination and program accessibility requirements of title II of the ADA. The 2004 ADAAG established specific requirements for the design and construction and alterations of cells in correctional facilities for the first time.

Based on complaints received by the Department, investigations, and compliance reviews of jails, prisons, and other detention and correctional facilities, the Department has determined that many detention and correctional facilities do not have enough accessible cells, toilets, and shower facilities to meet the needs of their inmates with mobility disabilities and some do not have any at all. Inmates are sometimes housed in medical units or infirmaries separate from the general population simply because there are no accessible cells. In addition, some inmates have alleged that they are housed at a more restrictive classification level simply because no accessible housing exists at the appropriate classification level. The Department's compliance reviews and investigations have substantiated certain of these allegations.

The Department believes that the insufficient number of accessible cells is, in part, due to the fact that most jails and prisons were built long before the ADA became law and, since then, have undergone few alterations that would trigger the obligation to provide accessible features in accordance with UFAS or the 1991 Standards. In addition, the Department has found that even some new correctional facilities lack accessible features. The Department believes that the unmet demand for accessible cells is also due to the changing demographics of the inmate population. With thousands of prisoners serving life sentences without eligibility for parole, prisoners are aging, and the prison population of individuals with disabilities and elderly individuals is growing. A Bureau of Justice Statistics study of State and Federal sentenced inmates (those sentenced to more than one year) shows the total estimated count of State and Federal prisoners aged 55 and older grew by 36,000 inmates from 2000 (44,200) to 2006 (80,200). William J. Sabol et al., *Prisoners in 2006*, Bureau of Justice Statistics Bulletin, Dec. 2007, at 23 (app. table 7), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&id=908> (last visited July 16, 2008); Allen J. Beck et al., *Prisoners in 2000*, Bureau of Justice Statistics Bulletin, Aug. 2001, at 10 (Aug. 2001) (Table 14), available at [bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&id=927](http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&id=927) (last visited July 16, 2008). This jump constitutes an increase of 81 percent in prisoners aged 55 and older during this period.

In the NPRM, the Department proposed a new section, § 35.152, which combined a range of provisions relating to both program accessibility and application of the proposed standards to detention and correctional facilities. In the final rule, the Department is placing those provisions that refer to design, construction, and alteration of detention and correction facilities in a new paragraph (k) of § 35.151, the section of the rule that addresses new construction and alterations for covered entities. Those portions of the final rule that address other issues, such as placement policies and program accessibility, are placed in the new § 35.152.

In the NPRM, the Department also sought input on how best to meet the needs of inmates with mobility disabilities in the design, construction, and alteration of detention and correctional facilities. The Department received a number of comments in response to this question.

**New Construction.** The NPRM did not expressly propose that new construction of correctional and detention facilities shall comply with the proposed standards because the Department assumed it would be clear that the requirements of § 35.151 would apply to new construction of correctional and detention facilities in the same manner that they apply to other facilities constructed by covered entities. The Department

has decided to create a new section, § 35.151(k)(1), which clarifies that new construction of jails, prisons, and other detention facilities shall comply with the requirements of 2010 Standards. Section 35.151(k)(1) also increases the scoping for accessible cells from the 2 percent specified in the 2004 ADAAG to 3 percent.

**Alterations.** Although the 2010 Standards contain specifications for alterations in existing detention and correctional facilities, section 232.2 defers to the Attorney General the decision as to the extent these requirements will apply to alterations of cells. The NPRM proposed at § 35.152(c) that “[a]lterations to jails, prisons, and other detention and correctional facilities will comply with the requirements of § 35.151(b).” 73 FR 34466, 34507 (June 17, 2008). The final rule retains that requirement at § 35.151(k)(2), but increases the scoping for accessible cells from the 2 percent specified in the 2004 ADAAG to 3 percent.

**Substitute cells.** In the ANPRM, the Department sought public comment about the most effective means to ensure that existing correctional facilities are made accessible to prisoners with disabilities and presented three options:

- (1) Require all altered elements to be accessible, which would maintain the current policy that applies to other ADA alteration requirements;
- (2) permit substitute cells to be made accessible within the same facility, which would permit correctional authorities to meet their obligation by providing the required accessible features in cells within the same facility, other than those specific cells in which alterations are planned; or
- (3) permit substitute cells to be made accessible within a prison system, which would focus on ensuring that prisoners with disabilities are housed in facilities that best meet their needs, as alterations within a prison environment often result in piecemeal accessibility.

In § 35.152(c) of the NPRM, the Department proposed language based on Option 2, providing that when cells are altered, a covered entity may satisfy its obligation to provide the required number of cells with mobility features by providing the required mobility features in substitute cells (i.e., cells other than those where alterations are originally planned), provided that each substitute cell is located within the same facility, is integrated with other cells to the maximum extent feasible, and has, at a minimum, physical access equal to that of the original cells to areas used by inmates or detainees for visitation, dining, recreation, educational programs, medical services, work programs, religious services, and participation in other programs that the facility offers to inmates or detainees.

The Department received few comments on this proposal. The majority who chose to comment supported an approach that allowed substitute cells to be made accessible within the same facility. In their view, such an approach balanced administrators' needs, cost considerations, and the needs of inmates with disabilities. One commenter noted, however, that with older facilities, required modifications may be inordinately costly and technically infeasible. A large county jail system supported the proposed approach as the most viable option allowing modification or alteration of existing cells based on need and providing a flexible approach to provide program and mobility accessibility. It noted, as an alternative, that permitting substitute cells to be made accessible within a prison system would also be a viable option since such an approach could create a centralized location for accessibility needs and, because that jail system's facilities were in close proximity, it would have little impact on families for visitation or on accessible programming.

A large State department of corrections objected to the Department's proposal. The commenter stated that some very old prison buildings have thick walls of concrete and reinforced steel that are difficult, if not impossible to retrofit, and to do so would be very expensive. This State system

approaches accessibility by looking at its system as a whole and providing access to programs for inmates with disabilities at selected prisons. This commenter explained that not all of its facilities offer the same programs or the same levels of medical or mental health services. An inmate, for example, who needs education, substance abuse treatment, and sex offender counseling may be transferred between facilities in order to meet his needs. The inmate population is always in flux and there are not always beds or program availability for every inmate at his security level. This commenter stated that the Department's proposed language would put the State in the position of choosing between adding accessible cells and modifying paths of travel to programs and services at great expense or not altering old facilities, causing them to become in states of disrepair and obsolescent, which would be fiscally irresponsible.

The Department is persuaded by these comments and has modified the alterations requirement in § 35.151(k)(2)(iv) in the final rule to allow that if it is technically infeasible to provide substitute cells in the same facility, cells can be provided elsewhere within the corrections system.

**Number of accessible cells.** Section 232.2.1 of the 2004 ADAAG requires at least 2 percent, but no fewer than one, of the cells in newly constructed detention and correctional facilities to have accessibility features for individuals with mobility disabilities. Section 232.3 provides that, where special holding cells or special housing cells are provided, at least one cell serving each purpose shall have mobility features. The Department sought input on whether these 2004 ADAAG requirements are sufficient to meet the needs of inmates with mobility disabilities. A major association representing county jails throughout the country stated that the 2004 ADAAG 2 percent requirement for accessible cells is sufficient to meet the needs of county jails. Similarly, a large county sheriff's department advised that the 2 percent requirement far exceeds the need at its detention facility, where the average age of the population is 32. This commenter stressed that the regulations need to address the differences between a local detention facility with low average lengths of stay as opposed to a State prison housing inmates for lengthy periods. This commenter asserted that more stringent requirements will raise construction costs by requiring modifications that are not needed. If more stringent requirements are adopted, the commenter suggested that they apply only to State and Federal prisons that house prisoners sentenced to long terms. The Department notes that a prisoner with a mobility disability needs a cell with mobility features regardless of the length of incarceration. However, the length of incarceration is most relevant in addressing the needs of an aging population.

The overwhelming majority of commenters responded that the 2 percent ADAAG requirement is inadequate to meet the needs of the incarcerated. Many commenters suggested that the requirement be expanded to apply to each area, type, use, and class of cells in a facility. They asserted that if a facility has separate areas for specific programs, such as a dog training program or a substance abuse unit, each of these areas should also have 2 percent accessible cells but not less than one. These same commenters suggested that 5-7 percent of cells should be accessible to meet the needs of both an aging population and the larger number of inmates with mobility disabilities. One organization recommended that the requirement be increased to 5 percent overall, and that at least 2 percent of each type and use of cell be accessible. Another commenter recommended that 10 percent of cells be accessible. An organization with extensive corrections experience noted that the integration mandate requires a sufficient number and distribution of accessible cells so as to provide distribution of locations relevant to programs to ensure that persons with disabilities have access to the programs.

Through its investigations and compliance reviews, the Department has found that in most detention and correctional facilities, a 2 percent accessible cell requirement is inadequate to meet the needs of the inmate population with disabilities. That finding is supported by the majority of the commenters that recommended a 5-7 percent requirement. Indeed, the Department itself requires more than 2 percent of

the cells to be accessible at its own corrections facilities. The Federal Bureau of Prisons is subject to the requirements of the 2004 ADAAG through the General Services Administration's adoption of the 2004 ADAAG as the enforceable accessibility standard for Federal facilities under the Architectural Barriers Act of 1968. 70 FR 67786, 67846-47 (Nov. 8, 2005). However, in order to meet the needs of inmates with mobility disabilities, the Bureau of Prisons has elected to increase that percentage and require that 3 percent of inmate housing at its facilities be accessible. Bureau of Prisons, Design Construction Branch, Design Guidelines, Attachment A: Accessibility Guidelines for Design, Construction, and Alteration of Federal Bureau of Prisons (Oct. 31, 2006).

The Department believes that a 3 percent accessible requirement is reasonable. Moreover, it does not believe it should impose a higher percentage on detention and corrections facilities than it utilizes for its own facilities. Thus, the Department has adopted a 3 percent requirement in § 35.151(k) for both new construction and alterations. The Department notes that the 3 percent requirement is a minimum. As corrections systems plan for new facilities or alterations, the Department urges planners to include numbers of inmates with disabilities in their population projections in order to take the necessary steps to provide a sufficient number of accessible cells to meet inmate needs.

*Dispersion of Cells.* The NPRM did not contain express language addressing dispersion of cells in a facility. However, Advisory 232.2 of the 2004 ADAAG recommends that “[a]ccessible cells or rooms should be dispersed among different levels of security, housing categories, and holding classifications (e.g., male/female and adult/juvenile) to facilitate access.” In explaining the basis for recommending, but not requiring, this type of dispersal, the Access Board stated that “[m]any detention and correctional facilities are designed so that certain areas (e.g., ‘shift’ areas) can be adapted to serve as different types of housing according to need” and that “[p]lacement of accessible cells or rooms in shift areas may allow additional flexibility in meeting requirements for dispersion of accessible cells or rooms.”

The Department notes that inmates are typically housed in separate areas of detention and correctional facilities based on a number of factors, including their classification level. In many instances, detention and correctional facilities have housed inmates in inaccessible cells, even though accessible cells were available elsewhere in the facility, because there were no cells in the areas where they needed to be housed, such as in administrative or disciplinary segregation, the women’s section of the facility, or in a particular security classification area.

The Department received a number of comments stating that dispersal of accessible cells together with an adequate number of accessible cells is necessary to prevent inmates with disabilities from placement in improper security classification and to ensure integration. Commenters recommended modification of the scoping requirements to require a percentage of accessible cells in each program, classification, use or service area. The Department is persuaded by these comments. Accordingly, § 35.151(k)(1) and (k)(2) of the final rule require accessible cells in each classification area.

*Medical facilities.* The NPRM also did not propose language addressing the application of the 2004 ADAAG to medical and long-term care facilities in correctional and detention facilities. The provisions of the 2004 ADAAG contain requirements for licensed medical and long-term care facilities, but not those that are unlicensed. A disability advocacy group and a number of other commenters recommended that the Department expand the application of section 232.4 to apply to all such facilities in detention and correctional facilities, regardless of licensure. They recommended that whenever a correctional facility has a program that is addressed specifically in the 2004 ADAAG, such as a long-term care facility, the 2004 ADAAG scoping and design features should apply for those elements. Similarly, a building code organization noted that its percentage requirements for accessible units is based on what occurs in the space, not on the building type.

The Department is persuaded by these comments and has added § 35.151(k)(3), which states that “[w]ith respect to medical and long-term care facilities in jails, prisons, and other detention and correctional facilities, public entities shall apply the 2010 Standards technical and scoping requirements for those facilities irrespective of whether those facilities are licensed.”

## Section 35.152 Detention and correctional facilities—program requirements

As noted in the discussion of § 35.151(k), the Department has determined that inmates with mobility and other disabilities in detention and correctional facilities do not have equal access to prison services. The Department's concerns are based not only on complaints it has received, but the Department's substantial experience in investigations and compliance reviews of jails, prisons, and other detention and correctional facilities. Based on that review, the Department has found that many detention and correctional facilities have too few or no accessible cells, toilets, and shower facilities to meet the needs of their inmates with mobility disabilities. These findings, coupled with statistics regarding the current percentage of inmates with mobility disabilities and the changing demographics of the inmate population reflecting thousands of prisoners serving life sentences and increasingly large numbers of aging inmates who are not eligible for parole, led the Department to conclude that a new regulation was necessary to address these concerns.

In the NPRM, the Department proposed a new section, § 35.152, which combined a range of provisions relating to both program accessibility and application of the proposed standards to detention and correctional facilities. As mentioned above, in the final rule, the Department is placing those provisions that refer to design, construction, and alteration of detention and correction facilities in new paragraph (k) in § 35.151 dealing with new construction and alterations for covered entities. Those portions of the final rule that address other program requirements remain in § 35.152.

The Department received many comments in response to the program accessibility requirements in proposed § 35.152. These comments are addressed below.

*Facilities operated through contractual, licensing, or other arrangements with other public entities or private entities.*

The

Department is aware that some public entities are confused about the applicability of the title II requirements to correctional facilities built or run by other public entities or private entities. It has consistently been the Department's position that title II requirements apply to correctional facilities used by State or local government entities, irrespective of whether the public entity contracts with another public or private entity to build or run the correctional facility. The power to incarcerate citizens rests with the State or local government, not a private entity. As the Department stated in the preamble to the original title II regulation, “[a]ll governmental activities of public entities are covered, even if they are carried out by contractors.” 28 CFR part 35, app. A at 558 (2009). If a prison is occupied by State prisoners and is inaccessible, the State is responsible under title II of the ADA. The same is true for a county or city jail. In essence, the private builder or contractor that operates the correctional facility does so at the direction of the government entity. Moreover, even if the State enters into a contractual, licensing, or other arrangement for correctional services with a public entity that has its own title II obligations, the State is still responsible for ensuring that the other public entity complies with title II in providing these services.

Also, through its experience in investigations and compliance reviews, the Department has noted that public entities contract for a number of services to be run by private or other public entities, for example, medical and mental health services, food services, laundry, prison industries, vocational programs, and drug treatment and substance abuse programs, all of which must be operated in accordance with title II requirements.

Proposed § 35.152(a) in the NPRM was designed to make it clear that title II applies to all State and local detention and correctional facilities, regardless of whether the detention or correctional facility is directly operated by the public entity or operated by a private entity through a contractual, licensing, or other arrangement. Commenters specifically supported the language of this section. One commenter cited Department of Justice statistics stating that of the approximately 1.6 million inmates in State and Federal facilities in December 2006, approximately 114,000 of these inmates were held in private prison facilities. See William J. Sabol et al., *Prisoners in 2006*, Bureau of Justice Statistics Bulletin, Dec. 2007, at 1, 4, available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pb&detail&iid=908>. Some commenters wanted the text "through contracts or other arrangements" changed to read "through contracts or any other arrangements" to make the intent clear. However, a large number of commenters recommended that the text of the rule make explicit that it applies to correctional facilities operated by private contractors. Many commenters also suggested that the text make clear that the rule applies to adult facilities, juvenile justice facilities, and community correctional facilities. In the final rule, the Department is adopting these latter two suggestions in order to make the section's intent explicit.

Section 35.152(a) of the final rule states specifically that the requirements of the section apply to public entities responsible for the operation or management of correctional facilities, "either directly or through contractual, licensing, or other arrangements with public or private entities, in whole or in part, including private correctional facilities." Additionally, the section explicitly provides that it applies to adult and juvenile justice detention and correctional facilities and community correctional facilities.

**Discrimination prohibited.** In the NPRM, § 35.152(b)(1) proposed language stating that public entities are prohibited from excluding qualified detainees and inmates from participation in, or denying, benefits, services, programs, or activities because a facility is inaccessible to persons with disabilities "unless the public entity can demonstrate that the required actions would result in a fundamental alteration or undue burden." 73 FR 34446, 34507 (June 17, 2008). One large State department of corrections objected to the entire section applicable to detention and correctional facilities, stating that it sets a higher standard for correctional and detention facilities because it does not provide a defense for undue administrative burden. The Department has not retained the proposed NPRM language referring to the defenses of fundamental alteration or undue burden because the Department believes that these exceptions are covered by the general language of 35.150(a)(3), which states that a public entity is not required to take "any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens." The Department has revised the language of § 35.152(b)(1) accordingly.

**Integration of inmates and detainees with disabilities.** In the NPRM, the Department proposed language in § 35.152(b)(2) specifically applying the ADA's general integration mandate to detention and correctional facilities. The proposed language would have required public entities to ensure that individuals with disabilities are housed in the most integrated setting appropriate to the needs of the individual. It further stated that unless the public entity can demonstrate that it is appropriate to make an exception for a specific individual, a public entity:

- (1) Should not place inmates or detainees with disabilities in locations that exceed their security classification because there are no accessible cells or beds in the appropriate classification;
- (2) should not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;
- (3) should not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would ordinarily be housed; and

- (4) should not place inmates or detainees with disabilities in facilities farther away from their families in order to provide accessible cells or beds, thus diminishing their opportunity for visitation based on their disability. 73 FR 34466, 34507 (June 17, 2008).

In the NPRM, the Department recognized that there are a wide range of considerations that affect decisions to house inmates or detainees and that in specific cases there may be compelling reasons why a placement that does not meet the general requirements of § 35.152(b)(2) may, nevertheless, comply with the ADA. However, the Department noted that it is essential that the planning process initially assume that inmates or detainees with disabilities will be assigned within the system under the same criteria that would be applied to inmates who do not have disabilities. Exceptions may be made on a case-by-case basis if the specific situation warrants different treatment. For example, if an inmate is deaf and communicates only using sign language, a prison may consider whether it is more appropriate to give priority to housing the prisoner in a facility close to his family that houses no other deaf inmates, or if it would be preferable to house the prisoner in a setting where there are sign language interpreters and other sign language users with whom he can communicate.

In general, commenters strongly supported the NPRM's clarification that the title II integration mandate applies to State and local corrections agencies and the facilities in which they house inmates. Commenters pointed out that inmates with disabilities continue to be segregated based on their disabilities and also excluded from participation in programs. An organization actively involved in addressing the needs of prisoners cited a number of recent lawsuits in which prisoners allege such discrimination.

The majority of commenters objected to the language in proposed § 35.152(b)(2) that creates an exception to the integration mandate when the "public entity can demonstrate that it is appropriate to make an exception for a specific individual." 73 FR 34466, 34507 (June 17, 2008). The vast majority of commenters asserted that, given the practice of many public entities to segregate and cluster inmates with disabilities, the exception will be used to justify the status quo. The commenters acknowledged that the intent of the section is to ensure that an individual with a disability who can be better served in a less integrated setting can legally be placed in that setting. They were concerned, however, that the proposed language would allow certain objectionable practices to continue, e.g., automatically placing persons with disabilities in administrative segregation. An advocacy organization with extensive experience working with inmates recommended that the inmate have "input" in the placement decision.

Others commented that the exception does not provide sufficient guidance on when a government entity may make an exception, citing the need for objective standards. Some commenters posited that a prison administration may want to house a deaf inmate at a facility designated and equipped for deaf inmates that is several hundred miles from the inmate's home. Although under the exception language, such a placement may be appropriate, these commenters argued that this outcome appears to contradict the regulation's intent to eliminate or reduce the segregation of inmates with disabilities and prevent them from being placed far from their families. The Department notes that in some jurisdictions, the likelihood of such outcomes is diminished because corrections facilities with different programs and levels of accessibility are clustered in close proximity to one another, so that being far from family is not an issue. The Department also takes note of advancements in technology that will ease the visitation dilemma, such as family visitation through the use of videoconferencing.

Only one commenter, a large State department of corrections, objected to the integration requirement. This commenter stated it houses all maximum security inmates in maximum security facilities. Inmates with lower security levels may or may not be housed in lower security facilities depending on a number of factors, such as availability of a bed, staffing, program availability, medical and mental health needs, and enemy separation. The commenter also objected to the proposal to prohibit housing inmates with disabilities in medical areas unless they are receiving medical care. This commenter stated that such housing may be necessary for several days, for example, at a stopover facility for an inmate with a disability who is being transferred from one facility to another. Also, this commenter stated that inmates with disabilities in disciplinary status may be housed in the infirmary because not every facility has accessible cells in disciplinary housing. Similarly the commenter objected to the prohibition on placing inmates in facilities without the same programs as facilities where they normally would be housed. Finally, the commenter objected to the prohibition on placing an inmate at a facility distant from where the inmate would normally be housed. The commenter stressed that in its system, there are few facilities near most inmates' homes. The commenter noted that most inmates are housed at facilities far from their homes, a fact shared by all inmates, not just inmates with disabilities. Another commenter noted that in some jurisdictions, inmates who need assistance in activities of daily living cannot obtain that assistance in the general population, but only in medical facilities where they must be housed.

The Department has considered the concerns raised by the commenters with respect to this section and recognizes that corrections systems may move inmates routinely and for a variety of reasons, such as crowding, safety, security, classification change, need for specialized programs, or to provide medical care. Sometimes these moves are within the same facility or prison system. On other occasions, inmates may be transferred to facilities in other cities, counties, and States. Given the nature of the prison environment, inmates have little say in their placement and administrators must have flexibility to meet the needs of the inmates and the system. The Department has revised the language of the exception contained in renumbered § 35.152(b)(2) to better accommodate corrections administrators' need for flexibility in making placement decisions based on legitimate, specific reasons. Moreover, the Department believes that temporary, short-term moves that are necessary for security or administrative purposes (e.g., placing an inmate with a disability in a medical area at a stopover facility during a transfer from one facility to another) do not violate the requirements of § 35.152(b)(2).

The Department notes that § 35.150(a)(3) states that a public entity is not required to take "any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." Thus, corrections systems would not have to comply with the requirements of § 35.152(b)(1) in any specific circumstance where these defenses are met.

Several commenters recommended that the word "should" be changed to "shall" in the subparts to § 35.152(b)(2). The Department agrees that because the rule contains a specific exception and because the integration requirement is subject to the defenses provided in paragraph (a) of that section, it is more appropriate to use the word "shall" and the Department accordingly is making that change in the final rule.

**Program requirements.** In a unanimous decision, the Supreme Court, in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), stated explicitly that the ADA covers the operations of State prisons; accordingly, title II's program accessibility requirements apply to State and local correctional and detention facilities. In the NPRM, in addressing the accessibility of existing correctional and detention

facilities, the Department considered the challenges of applying the title II program access requirement for existing facilities under § 31.150(a) in light of the realities of many inaccessible correctional facilities and strained budgets.

Correctional and detention facilities commonly provide a variety of different programs for education, training, counseling, or other purposes related to rehabilitation. Some examples of programs generally available to inmates include programs to obtain GEDs, computer training, job skill training and on-the-job training, religious instruction and guidance, alcohol and substance abuse groups, anger management, work assignments, work release, halfway houses, and other programs. Historically, individuals with disabilities have been excluded from such programs because they are not located in accessible locations, or inmates with disabilities have been segregated in units without equivalent programs. In light of the Supreme Court's decision in Yeskey and the requirements of title II, however, it is critical that public entities provide these opportunities to inmates with disabilities. In proposed § 35.152, the Department sought to clarify that title II required equal access for inmates with disabilities to participate in programs offered to inmates without disabilities.

The Department wishes to emphasize that detention and correctional facilities are unique facilities under title II. Inmates cannot leave the facilities and must have their needs met by the corrections system, including needs relating to a disability. If the detention and correctional facilities fail to accommodate prisoners with disabilities, these individuals have little recourse, particularly when the need is great (e.g., an accessible toilet; adequate catheters; or a shower chair). It is essential that corrections systems fulfill their nondiscrimination and program access obligations by adequately addressing the needs of prisoners with disabilities, which include, but are not limited to, proper medication and medical treatment, accessible toilet and shower facilities, devices such as a bed transfer or a shower chair, and assistance with hygiene methods for prisoners with physical disabilities.

In the NPRM, the Department also sought input on whether it should establish a program accessibility requirement that public entities modify additional cells at a detention or correctional facility to incorporate the accessibility features needed by specific inmates with mobility disabilities when the number of cells required by sections 232.2 and 232.3 of the 2004 ADAAG are inadequate to meet the needs of their inmate population.

Commenters supported a program accessibility requirement, viewing it as a flexible and practical means of allowing facilities to meet the needs of inmates in a cost effective and expedient manner. One organization supported a requirement to modify additional cells when the existing number of accessible cells is inadequate. It cited the example of a detainee who was held in a hospital because the local jail had no accessible cells. Similarly, a State agency recommended that the number of accessible cells should be sufficient to accommodate the population in need. One group of commenters voiced concern about accessibility being provided in a timely manner and recommended that the rule specify that the program accessibility requirement applies while waiting for the accessibility modifications. A group with experience addressing inmate needs recommended the inmate's input should be required to prevent inappropriate segregation or placement in an inaccessible or inappropriate area.

The Department is persuaded by these comments. Accordingly, § 35.152(b)(3) requires public entities to "implement reasonable policies, including physical modifications to additional cells in accordance with the 2010 Standards, so as to ensure that each inmate with a disability is housed in a cell with the accessible elements necessary to afford the inmate access to safe, appropriate housing."

**Communication.** Several large disability advocacy organizations commented on the 2004 ADAAG section 232.2.2 requirement that at least 2 percent of the general holding cells and housing cells must be equipped with audible emergency alarm systems. Permanently installed telephones within these cells

must have volume control. Commenters said that the communication features in the 2004 ADAAG do not address the most common barriers that deaf and hard-of-hearing inmates face. They asserted that few cells have telephones and the requirements to make them accessible is limited to volume control, and that emergency alarm systems are only a small part of the amplified information that inmates need. One large association commented that it receives many inmate complaints that announcements are made over loudspeakers or public address systems, and that inmates who do not hear announcements for inmate count or other instructions face disciplinary action for failure to comply. They asserted that inmates who miss announcements miss meals, exercise, showers, and recreation. They argued that systems that deliver audible announcements, signals, and emergency alarms must be made accessible and that TTYs must be made available. Commenters also recommended that correctional facilities should provide access to advanced forms of telecommunications. Additional commenters noted that few persons now use TTYs, preferring instead to communicate by email, texting, and videophones.

The Department agrees with the commenters that correctional facilities and jails must ensure that inmates who are deaf or hard of hearing actually receive the same information provided to other inmates. The Department believes, however, that the reasonable modifications, program access, and effective communications requirements of title II are sufficient to address the needs of individual deaf and hard of hearing inmates, and as a result, declines to add specific requirements for communications features in cells for deaf and hard of hearing inmates at this time. The Department notes that as part of its ongoing enforcement of the reasonable modifications, program access, and effective communications requirements of title II, the Department has required correctional facilities and jails to provide communication features in cells serving deaf and hard of hearing inmates.

## Subpart E—Communications

### Section 35.160 Communications.

Section 35.160 of the 1991 title II regulation requires a public entity to take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others. 28 CFR 35.160(a). In addition, a public entity must “furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.” 28 CFR 35.160(b)(1). Moreover, the public entity must give “primary consideration to the requests of the individual with disabilities” in determining what type of auxiliary aid and service is necessary. 28 CFR 35.160(b)(2).

Since promulgation of the 1991 title II regulation, the Department has investigated hundreds of complaints alleging failures by public entities to provide effective communication, and many of these investigations resulted in settlement agreements and consent decrees. From these investigations, the Department has concluded that public entities sometimes misunderstand the scope of their obligations under the statute and the regulation. Section 35.160 in the final rule codifies the Department's longstanding policies in this area and includes provisions that reflect technological advances in the area of auxiliary aids and services.

In the NPRM, the Department proposed adding “companion” to the scope of coverage under § 35.160 to codify the Department's longstanding position that a public entity's obligation to ensure effective communication extends not just to applicants, participants, and members of the public with disabilities, but to *companions* as well, if any of

them are individuals with disabilities. The NPRM defined companion as a person who is a family member, friend, or associate of a program participant, who, along with the program participant, is "an appropriate person with whom the public entity should communicate." 73 FR 34466, 34507 (June 17, 2008).

Many commenters supported inclusion of "companions" in the rule, and urged even more specific language about public entities' obligations. Some commenters asked the Department to clarify that a companion with a disability may be entitled to effective communication from a public entity even though the applicants, participants, or members of the general public seeking access to, or participating in, the public entity's services, programs, or activities are not individuals with disabilities. Others requested that the Department explain the circumstances under which auxiliary aids and services should be provided to companions. Still others requested explicit clarification that where the individual seeking access to or participating in the public entity's program, services, or activities requires auxiliary aids and services, but the companion does not, the public entity may not seek out, or limit its communications to, the companion instead of communicating directly with the individual with a disability when it would be appropriate to do so.

Some in the medical community objected to the inclusion of any regulatory language regarding companions, asserting that such language is overbroad, seeks services for individuals whose presence is not required by the public entity, is not necessary for the delivery of the services or participation in the program, and places additional burdens on the medical community. These commenters asked that the Department limit the public entity's obligation to communicate effectively with a companion to situations where such communications are necessary to serve the interests of the person who is receiving the public entity's services.

After consideration of the many comments on this issue, the Department believes that explicit inclusion of "companions" in the final rule is appropriate to ensure that public entities understand the scope of their effective communication obligations. There are many situations in which the interests of program participants without disabilities require that their companions with disabilities be provided effective communication. In addition, the program participant need not be physically present to trigger the public entity's obligations to a companion. The controlling principle is that auxiliary aids and services must be provided if the companion is an appropriate person with whom the public entity should or would communicate.

Examples of such situations include back-to-school nights or parent-teacher conferences at a public school. If the faculty writes on the board or otherwise displays information in a visual context during a back-to-school night, this information must be communicated effectively to parents or guardians who are blind or have low vision. At a parent-teacher conference, deaf parents or guardians must be provided with appropriate auxiliary aids and services to communicate effectively with the teacher and administrators. It makes no difference that the child who attends the school does not have a disability. Likewise, when a deaf spouse attempts to communicate with public social service agencies about the services necessary for the hearing spouse, appropriate auxiliary aids and services to the deaf spouse must be provided by the public entity to ensure effective communication. Parents or guardians, including foster parents, who are individuals with disabilities, may need to interact with child services agencies on behalf of their children; in such a circumstance, the child services agencies would need to provide appropriate auxiliary aids and services to those parents or guardians.

Effective communication with companions is particularly critical in health care settings where miscommunication may lead to misdiagnosis and improper or delayed medical treatment. The Department has encountered confusion and reluctance by medical care providers regarding the scope of their obligation with respect to such companions. Effective communication with a companion is necessary in a variety of circumstances. For example, a companion may be legally authorized to make health care decisions on behalf of the patient or may need to help the patient

with information or instructions given by hospital personnel. A companion may be the patient's next-of-kin or health care surrogate with whom hospital personnel must communicate about the patient's medical condition. A companion could be designated by the patient to communicate with hospital personnel about the patient's symptoms, needs, condition, or medical history. Or the companion could be a family member with whom hospital personnel normally would communicate.

Accordingly, § 35.160(a)(1) in the final rule now reads, “[a] public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.” Section 35.160(a)(2) further defines “companion” as “a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with the individual, is an appropriate person with whom the public entity should communicate.” Section 35.160(b)(1) clarifies that the obligation to furnish auxiliary aids and services extends to companions who are individuals with disabilities, whether or not the individual accompanied also is an individual with a disability. The provision now states that “[a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.”

These provisions make clear that if the companion is someone with whom the public entity normally would or should communicate, then the public entity must provide appropriate auxiliary aids and services to that companion to ensure effective communication with the companion. This common-sense rule provides the guidance necessary to enable public entities to properly implement the nondiscrimination requirements of the ADA.

As set out in the final rule, § 35.160(b)(2) states, in pertinent part, that “[t]he type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual, the nature, length, and complexity of the communication involved, and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities.”

The second sentence of § 35.160(b)(2) of the final rule restores the “primary consideration” obligation set out at § 35.160(b)(2) in the 1991 title II regulation. This provision was inadvertently omitted from the NPRM, and the Department agrees with the many commenters on this issue that this provision should be retained. As noted in the preamble to the 1991 title II regulation, and reaffirmed here: “The public entity shall honor the choice [of the individual with a disability] unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 35.164. Deference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication.” 28 CFR part 35, app. A at 580 (2009).

The first sentence in § 35.160(b)(2) codifies the axiom that the type of auxiliary aid or service necessary to ensure effective communication will vary with the situation, and provides factors for consideration in making the determination, including the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. Inclusion of this language under title II is consistent with longstanding policy in this area. See, e.g., *The Americans with Disabilities Act Title II Technical Assistance Manual Covering State and Local Government Programs and Services*, section II-7.1000, available at [www.ada.gov/taman2.html](http://www.ada.gov/taman2.html) (“The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the length and complexity of the communication involved. \*\*\* Sign language or oral interpreters, for example, may be required when the information being communicated in a transaction with a deaf individual is complex, or is exchanged for a lengthy period of time. Factors to be considered

in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication."); see also 28 CFR part 35, app. A at 580 (2009). As explained in the NPRM, an individual who is deaf or hard of hearing may need a qualified interpreter to communicate with municipal hospital personnel about diagnoses, procedures, tests, treatment options, surgery, or prescribed medication (e.g., dosage, side effects, drug interactions, etc.), or to explain follow-up treatments, therapies, test results, or recovery. In comparison, in a simpler, shorter interaction, the method to achieve effective communication can be more basic. An individual who is seeking local tax forms may only need an exchange of written notes to achieve effective communication.

Section 35.160(c)(1) has been added to the final rule to make clear that a public entity shall not require an individual with a disability to bring another individual to interpret for him or her. The Department receives many complaints from individuals who are deaf or hard of hearing alleging that public entities expect them to provide their own sign language interpreters. Proposed § 35.160(c)(1) was intended to clarify that when a public entity is interacting with a person with a disability, it is the public entity's responsibility to provide an interpreter to ensure effective communication. It is not appropriate to require the person with a disability to bring another individual to provide such services.

Section 35.160(c)(2) of the NPRM proposed codifying the Department's position that there are certain limited instances when a public entity may rely on an accompanying individual to interpret or facilitate communication: (1) In an emergency involving a threat to the public safety or welfare; or (2) if the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances.

Many commenters supported this provision, but sought more specific language to address what they see as a particularly entrenched problem. Some commenters requested that the Department explicitly require the public entity first to notify the individual with a disability that the individual has a right to request and receive appropriate auxiliary aids and services without charge from the public entity before using that person's accompanying individual as a communication facilitator. Advocates stated that an individual who is unaware of his or her rights may decide to use a third party simply because he or she believes that is the only way to communicate with the public entity.

The Department has determined that inclusion of specific language requiring notification is unnecessary. Section 35.160(b)(1) already states that is the responsibility of the public entity to provide auxiliary aids and services. Moreover, § 35.130(f) already prohibits the public entity from imposing a surcharge on a particular individual with a disability or on any group of individuals with disabilities to cover the costs of auxiliary aids. However, the Department strongly advises public entities that they should first inform the individual with a disability that the public entity can and will provide auxiliary aids and services, and that there would be no cost for such aids or services.

Many commenters requested that the Department make clear that the public entity cannot request, rely upon, or coerce an adult accompanying an individual with a disability to provide effective communication for that individual with a disability—that only a voluntary offer is acceptable. The Department states unequivocally that consent of, and for, the adult accompanying the individual with a disability to facilitate communication must be provided freely and voluntarily both by the individual with a disability and the accompanying third party—absent an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available. The public entity may not coerce or attempt to persuade another adult to provide effective communication for the individual with a disability. Some commenters expressed concern that the regulation could be read by public entities, including medical providers, to prevent parents, guardians, or caregivers from providing effective

communication for children or that a child, regardless of age, would have to specifically request that his or her caregiver act as interpreter. The Department does not intend § 35.160(c)(2) to prohibit parents, guardians, or caregivers from providing effective communication for children where so doing would be appropriate. Rather, the rule prohibits public entities, including medical providers, from requiring, relying on, or forcing adults accompanying individuals with disabilities, including parents, guardians, or caregivers, to facilitate communication.

Several commenters asked that the Department make absolutely clear that children are not to be used to provide effective communication for family members and friends, and that it is the public entity's responsibility to provide effective communication, stating that often interpreters are needed in settings where it would not be appropriate for children to be interpreting, such as those involving medical issues, domestic violence, or other situations involving the exchange of confidential or adult-related material. Commenters observed that children are often hesitant to turn down requests to provide communication services, and that such requests put them in a very difficult position vis-a-vis family members and friends. The Department agrees. It is the Department's position that a public entity shall not rely on a minor child to facilitate communication with a family member, friend, or other individual, except in an emergency involving imminent threat to the safety or welfare of an individual or the public where there is no interpreter available. Accordingly, the Department has revised the rule to state: "A public entity shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving imminent threat to the safety or welfare of an individual or the public where there is no interpreter available." § 35.160(c)(3). Sections 35.160(c)(2) and (3) have no application in circumstances where an interpreter would not otherwise be required in order to provide effective communication (e.g., in simple transactions such as purchasing movie tickets at a theater). The Department stresses that privacy and confidentiality must be maintained but notes that covered entities, such as hospitals, that are subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, Privacy Rules are permitted to disclose to a patient's relative, close friend, or any other person identified by the patient (such as an interpreter) relevant patient information if the patient agrees to such disclosures. See 45 CFR parts 160 and 164. The agreement need not be in writing. Covered entities should consult the HIPAA Privacy Rules regarding other ways disclosures might be able to be made to such persons.

With regard to emergency situations, the NPRM proposed permitting reliance on an individual accompanying an individual with a disability to interpret or facilitate communication in an emergency involving a threat to the public safety or welfare. Commenters requested that the Department make clear that often a public entity can obtain appropriate auxiliary aids and services in advance of an emergency by making necessary advance arrangements, particularly in anticipated emergencies such as predicted dangerous weather or certain medical situations such as childbirth. These commenters did not want public entities to be relieved of their responsibilities to provide effective communication in emergency situations, noting that the obligation to provide effective communication may be more critical in such situations. Several commenters requested a separate rule that requires public entities to provide timely and effective communication in the event of an emergency, noting that the need for effective communication escalates in an emergency.

Commenters also expressed concern that public entities, particularly law enforcement authorities and medical personnel, would apply the "emergency situation" provision in inappropriate circumstances and would rely on accompanying individuals without making any effort to seek appropriate auxiliary aids and services. Other commenters asked that the Department narrow this provision so that it would not be available to entities that are responsible for emergency preparedness and response. Some commenters noted that certain exigent circumstances, such as those that exist during and perhaps immediately after, a major hurricane, temporarily may excuse public entities of their responsibilities to provide effective communication. However, they asked that the Department clarify that these obligations are ongoing and that, as soon as such situations begin to abate or stabilize, the public entity must provide effective communication.

The Department recognizes that the need for effective communication is critical in emergency situations. After due consideration of all of these concerns raised by commenters, the Department has revised § 35.160(c) to narrow the exception permitting reliance on individuals accompanying the individual with a disability during an emergency to make it clear that it only applies to emergencies involving an "imminent threat to the safety or welfare of an individual or the public." See § 35.160(c)(2)-(3). Arguably, all visits to an emergency room or situations to which emergency workers respond are by definition emergencies. Likewise, an argument can be made that most situations that law enforcement personnel respond to involve, in one way or another, a threat to the safety or welfare of an individual or the public. The imminent threat exception in § 35.160(c)(2)-(3) is not intended to apply to the typical and foreseeable emergency situations that are part of the normal operations of these institutions. As such, a public entity may rely on an accompanying individual to interpret or facilitate communication under the § 35.160(c)(2)-(3) imminent threat exception only where in truly exigent circumstances, i.e., where any delay in providing immediate services to the individual could have life-altering or life-ending consequences.

Many commenters urged the Department to stress the obligation of State and local courts to provide effective communication. The Department has received many complaints that State and local courts often do not provide needed qualified sign language interpreters to witnesses, litigants, jurors, potential jurors, and companions and associates of persons participating in the legal process. The Department cautions public entities that without appropriate auxiliary aids and services, such individuals are denied an opportunity to participate fully in the judicial process, and denied benefits of the judicial system that are available to others.

Another common complaint about access to State and local court systems is the failure to provide effective communication in deferral programs that are intended as an alternative to incarceration, or for other court-ordered treatment programs. These programs must provide effective communication, and courts referring individuals with disabilities to such programs should only refer individuals with disabilities to programs or treatment centers that provide effective communication. No person with a disability should be denied access to the benefits conferred through participation in a court-ordered referral program on the ground that the program purports to be unable to provide effective communication.

The general nondiscrimination provision in § 35.130(a) provides that no individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity. The Department consistently interprets this provision and § 35.160 to require effective communication in courts, jails, prisons, and with law enforcement officers. Persons with disabilities who are participating in the judicial process as witnesses, jurors, prospective jurors, parties before the court, or companions of persons with business in the court, should be provided auxiliary aids and services as needed for effective communication. The Department has developed a variety of technical assistance and guidance documents on the requirements for title II entities to provide effective communication; those materials are available on the Department Web site at: <http://www.ada.gov>.

Many advocacy groups urged the Department to add language in the final rule that would require public entities to provide accessible material in a manner that is timely, accurate, and private. The Department has included language in § 35.160(b)(2) stating that "[i]n order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way so as to protect the privacy and independence of the individual with a disability."

Because the appropriateness of particular auxiliary aids and services may vary as a situation changes, the Department strongly encourages public entities to do a communication assessment of the individual with a disability when the need for auxiliary aids and services is first identified, and to re-assess communication

effectiveness regularly throughout the communication. For example, a deaf individual may go to an emergency department of a public community health center with what is at first believed to be a minor medical emergency, such as a sore knee, and the individual with a disability and the public community health center both believe that exchanging written notes will be effective. However, during that individual's visit, it is determined that the individual is, in fact, suffering from an anterior cruciate ligament tear and must have surgery to repair the torn ligament. As the situation develops and the diagnosis and recommended course of action evolve into surgery, an interpreter most likely will be necessary. A public entity has a continuing obligation to assess the auxiliary aids and services it is providing, and should consult with individuals with disabilities on a continuing basis to assess what measures are required to ensure effective communication. Public entities are further advised to keep individuals with disabilities apprised of the status of the expected arrival of an interpreter or the delivery of other requested or anticipated auxiliary aids and services.

**Video remote interpreting (VRI) services.** In § 35.160(d) of the NPRM, the Department proposed the inclusion of four performance standards for VRI (which the NPRM termed video interpreting services (VIS)), for effective communication:

- (1) High-quality, clear, real-time, full-motion video and audio over a dedicated high-speed Internet connection;
- (2) a clear, sufficiently large, and sharply delineated picture of the participating individual's head, arms, hands, and fingers, regardless of his body position;
- (3) clear transmission of voices; and
- (4) persons who are trained to set up and operate the VRI quickly. Commenters generally approved of those performance standards, but recommended that some additional standards be included in the final rule. Some State agencies and advocates for persons with disabilities requested that the Department add more detail in the description of the first standard, including modifying the term "dedicated high-speed Internet connection" to read "dedicated high-speed, wide-bandwidth video connection." These commenters argued that this change was necessary to ensure a high-quality video image that will not produce lags, choppy images, or irregular pauses in communication. The Department agrees with those comments and has amended the provision in the final rule accordingly.

For persons who are deaf with limited vision, commenters requested that the Department include an explicit requirement that interpreters wear high-contrast clothing with no patterns that might distract from their hands as they are interpreting, so that a person with limited vision can see the signs made by the interpreter. While the Department reiterates the importance of such practices in the delivery of effective VRI, as well as in-person interpreting, the Department declines to adopt such performance standards as part of this rule. In general, professional interpreters already follow such practices—the Code of Professional Conduct for interpreters developed by the Registry of Interpreters for the Deaf, Inc. and the National Association of the Deaf incorporates attire considerations into their standards of professionalism and conduct. (This code is available at <http://www.vid.org/userfiles/file/pdfs/codeofethics.pdf> (Last visited July 18, 2010). Moreover, as a result of this code, many VRI agencies have adopted detailed dress standards that interpreters hired by the agency must follow. In addition, commenters urged that a clear image of the face and eyes of the interpreter and others be explicitly required. Because the face includes the eyes, the Department has amended § 35.160(d)(2) of the final rule to include a requirement that the interpreter's face be displayed.

In response to comments seeking more training for users and non-technicians responsible for VRI in title II facilities, the Department is extending the requirement in § 35.160(d)(4) to require training for “users of the technology” so that staff who would have reason to use the equipment in an emergency room, State or local court, or elsewhere are properly trained. Providing for such training will enhance the success of VRI as means of providing effective communication.

**Captioning at sporting venues.** In the NPRM at § 35.160(e), the Department proposed that sports stadiums that have a capacity of 25,000 or more shall provide captioning for safety and emergency information on scoreboards and video monitors. In addition, the Department posed four questions about captioning of information, especially safety and emergency information announcements, provided over public address (PA) systems. The Department received many extremely detailed and divergent responses to each of the four questions and the proposed regulatory text. Because comments submitted on the Department's title II and title III proposals were intertwined, because of the similarity of issues involved for title II entities and title III entities, and in recognition of the fact that many large sports stadiums are covered by both title II and title III as joint operations of State or local governments and one or more public accommodations, the Department presents here a single consolidated review and summary of the issues raised in comments.

The Department asked whether requiring captioning of safety and emergency information made over the public address system in stadiums seating fewer than 25,000 would create an undue burden for smaller entities, whether it would be feasible for small stadiums, or whether a larger threshold, such as sports stadiums with a capacity of 50,000 or more, would be appropriate.

There was a consensus among the commenters, including disability advocates as well as venue owners and stadium designers and operators, that using the stadium size or seating capacity as the exclusive deciding factor for any obligation to provide captioning for safety and emergency information broadcast over the PA system is not preferred. Most disability advocacy organizations and individuals with disabilities complained that using size or seating capacity as a threshold for captioning safety and emergency information would undermine the “undue burden” defense found in both titles II and III. Many commenters provided examples of facilities like professional hockey arenas that seat less than 25,000 fans but which, commenters argued, should be able to provide real-time captioning. Other commenters suggested that some high school or college stadiums, for example, may hold 25,000 fans or more and yet lack the resources to provide real-time captioning. Many commenters noted that real-time captioning would require trained stenographers and that most high school and college sports facilities rely upon volunteers to operate scoreboards and PA systems, and they would not be qualified stenographers, especially in case of an emergency. One national association noted that the typical stenographer expense for a professional football game in Washington, DC is about \$550 per game. Similarly, one trade association representing venues estimated that the cost for a professional stenographer at a sporting event runs between \$500 and \$1,000 per game or event, the cost of which, they argued, would be unduly burdensome in many cases. Some commenters posited that schools that do not sell tickets to athletic events would find it difficult to meet such expenses, in contrast to major college athletic programs and professional sports teams, which would be less likely to prevail using an “undue burden” defense.

Some venue owners and operators and other covered entities argued that stadium size should not be the key consideration when requiring scoreboard captioning. Instead, these entities suggested that equipment already installed in the stadium, including necessary electrical equipment and backup power supply, should be the determining factor for whether captioning is mandated. Many commenters argued that the requirement to provide captioning should only apply to stadiums with scoreboards that meet the National Fire Protection Association (NFPA) National Fire Alarm Code (NFPA 72). Commenters reported that NFPA 72 requires at least two independent and reliable power supplies for emergency information

systems, including one source that is a generator or battery sufficient to run the system in the event the primary power fails. Alternatively, some stadium designers and title II entities commented that the requirement should apply when the facility has at least one elevator providing firefighter emergency operation, along with approval of authorities with responsibility for fire safety. Other commenters argued for flexibility in the requirements for providing captioning and that any requirement should only apply to stadiums constructed after the effective date of the regulation.

In the NPRM, the Department also asked whether the rule should address the specific means of captioning equipment, whether it should be provided through any effective means (scoreboards, line boards, handheld devices, or other means), or whether some means, such as handheld devices, should be eliminated as options. This question elicited many comments from advocates for persons with disabilities as well as from covered entities. Advocacy organizations and individuals with experience using handheld devices argue that such devices do not provide effective communication. These commenters noted that information is often delayed in the transmission to such devices, making them hard to use when following action on the playing field or in the event of an emergency when the crowd is already reacting to aural information provided over the PA system well before it is received on the handheld device.

Several venue owners and operators and others commented that handheld technology offers advantages of flexibility and portability so that it may be used successfully regardless of where in the facility the user is located, even when not in the line of sight of a scoreboard or other captioning system. Still other commenters urged the Department not to regulate in such a way as to limit innovation and use of such technology now and in the future. Cost considerations were included in some comments from some stadium designers and venue owners and operators, who reported that the cost of providing handheld systems is far less than the cost of real-time captioning on scoreboards, especially in facilities that do not currently have the capacity to provide real-time captions on existing equipment. Others noted that handheld technology is not covered by fire and safety model codes, including the NFPA, and thus would be more easily adapted into existing facilities if captioning were required by the Department.

The Department also asked about providing open captioning of all public address announcements, and not limiting captioning to safety and emergency information. A variety of advocates and persons with disabilities argued that all information broadcast over a PA system should be captioned in real time at all facilities in order to provide effective communication and that a requirement only to provide emergency and safety information would not be sufficient. A few organizations for persons with disabilities commented that installation of new systems should not be required, but that all systems within existing facilities that are capable of providing captioning must be utilized to the maximum extent possible to provide captioning of as much information as possible. Several organizations representing persons with disabilities commented that all facilities must include in safety planning the requirement to caption all aurally-provided information for patrons with communication disabilities. Some advocates suggested that demand for captions will only increase as the number of deaf and hard of hearing persons grows with the aging of the general population and with increasing numbers of veterans returning from war with disabilities. Multiple comments noted that the captioning would benefit others as well as those with communication disabilities.

By contrast, venue owners and operators and others commented that the action on the sports field is self-explanatory and does not require captioning and they objected to an explicit requirement to provide real-time captioning for all information broadcast on the PA system at a sporting event. Other commenters objected to requiring captioning even for emergency and safety information over the scoreboard rather than through some other means. By contrast, venue operators, State government agencies, and some model code groups, including NFPA, commented that emergency and safety information must be

provided in an accessible format and that public safety is a paramount concern. Other commenters argued that the best method to deliver safety and emergency information would be television monitors showing local TV broadcasts with captions already mandated by the FCC. Some commenters posited that the most reliable information about a major emergency would be provided on the television news broadcasts. Several commenters argued that television monitors may be located throughout the facility, improving line of sight for patrons, some of whom might not be able to see the scoreboard from their seats or elsewhere in the facility. Some stadium designers, venue operators, and model code groups pointed out that video monitors are not regulated by the NFPA or other agencies, so that such monitors could be more easily provided. Video monitors may receive transmissions from within the facility and could provide real-time captions if there is the necessary software and equipment to feed the captioning signal to a closed video network within the facility. Several comments suggested that using monitors would be preferable to requiring captions on the scoreboard if the regulation mandates real-time captioning. Some venue owners and operators argued that retrofitting existing stadiums with new systems could easily cost hundreds of thousands of dollars per scoreboard or system. Some stadium designers and others argued that captioning should only be required in stadiums built after the effective date of the regulation. For stadiums with existing systems that allow for real-time captioning, one commenter posited that dedicating the system exclusively to real-time captioning would lead to an annual loss of between \$2 and \$3 million per stadium in revenue from advertising currently running in that space.

After carefully considering the wide range of public comments on this issue, the Department has concluded that the final rule will not provide additional requirements for effective communication or emergency information provided at sports stadiums at this time. The 1991 title II and title III regulations and statutory requirements are not in any way affected by this decision. The decision to postpone rulemaking on this complex issue is based on a number of factors, including the multiple layers of existing regulation by various agencies and levels of government, and the wide array of information, requests, and recommendations related to developing technology offered by the public. In addition, there is a huge variety of covered entities, information and communication systems, and differing characteristics among sports stadiums. The Department has concluded that further consideration and review would be prudent before it issues specific regulatory requirements.

## Section 35.161 Telecommunications.

The Department proposed to retitle this section “Telecommunications” to reflect situations in which the public entity must provide an effective means to communicate by telephone for individuals with disabilities. First, the NPRM proposed redesignating § 35.161 as § 35.161(a) and replacing the term “Telecommunications devices for the deaf (TDD)” with “Text telephones (TTY).” Public comment was universally supportive of this change in nomenclature to TTY.

In the NPRM, at § 35.161(b), the Department addressed automated-attendant systems that handle telephone calls electronically. Often individuals with disabilities, including persons who are deaf or hard of hearing, are unable to use such automated systems. Some systems are not compatible with TTYS or the telecommunications relay service. Automated systems can and often do disconnect calls from TTYS or relay calls, making it impossible for persons using a TTY or relay system to do business with title II entities in the same manner as others. The Department proposed language that would require a telecommunications service to permit persons using relay or TTYS or other assistive technology to use the automated-attendant system provided by the public entity. The FCC raised this concern with the Department after the 1991 title II regulation went into effect, and the Department acted upon that request in the NPRM. Comments from disability advocates and persons with disabilities consistently requested

the provision be amended to cover “voice mail, messaging, auto-attendant, and interactive voice response systems.” The Department recognizes that those are important features of widely used telecommunications technology that should be as accessible to persons who are deaf or hard of hearing as they are to others, and has amended the section in the final rule to include the additional features.

Many commenters, including advocates and persons with disabilities, as well as State agencies and national organizations, asked that all automated systems have an option for the caller to bypass the automated system and speak to a live person who could communicate using relay services. The Department understands that automated telecommunications systems typically do not offer the opportunity to avoid or bypass the automated system and speak to a live person. The Department believes that at this time it is inappropriate to add a requirement that all such systems provide an override capacity that permits a TTY or relay caller to speak with a live clerk on a telecommunications relay system. However, if a system already provides an option to speak to a person, that system must accept TTY and relay calls and must not disconnect or refuse to accept such calls.

Other comments from advocacy organizations and individuals urged the Department to require specifications for the operation of such systems that would involve issuing technical requirements for encoding and storage of automated text, as well as controls for speed, pause, rewind, and repeat, and prompts without any background noise. The same comments urged that these requirements should be consistent with a pending advisory committee report to the Access Board, submitted in April 2008. See Telecommunications and Electronic Information Technology Advisory Committee, Report to the Access Board Refreshed Accessibility Standards and Guidelines in Telecommunications and Electronic and Information Technology (Apr. 2008) available at <http://www.access-board.gov/sec508/refresh/report/>. The Department is declining at this time to preempt ongoing consideration of these issues by the Board. Instead, the Department will monitor activity by the Board. The Department is convinced that the general requirement to make such automated systems usable by persons with disabilities is appropriate at this time and title II entities should evaluate their automated systems in light of concerns about providing systems that offer effective communication to persons with disabilities.

Finally, the Department has adopted in § 35.161(c) of the final rule the requirement that all such systems must not disconnect or refuse to take calls from all forms of FCC-approved telecommunications relay systems, including Internet-based relay systems. (Internet-based relay systems refer to the mechanism by which the message is relayed). They do not require a public entity to have specialized computer equipment. Commenters from some State agencies, many advocacy organizations, and individuals strongly urged the Department to mandate such action because of the high proportion of TTY calls and relay service calls that are not completed because the title II entity's phone system or employees do not take the calls. This presents a serious obstacle for persons doing business with State and local government and denies persons with disabilities access to use the telephone for business that is typically handled over the phone for others.

In addition, commenters requested that the Department include “real-time” before any mention of “computer-aided” technology to highlight the value of simultaneous translation of any communication. The Department has added “real-time” before “computer-aided transcription services” in the definition of “auxiliary aids in § 35.104 and before “communication” in § 35.161(b).

## Subpart F—Compliance Procedures

### Section 35.171 Acceptance of complaints.

In the NPRM, the Department proposed changing the current language in § 35.171(a)(2)(i) regarding misdirected complaints to make it clear that if an agency receives a complaint for which it lacks jurisdiction either under section 504 or as a designated agency under the ADA, the agency may refer the complaint to the appropriate agency with title II or section 504 jurisdiction or to the Department of Justice. The language of the 1991 title II regulation only requires the agency to refer such a complaint to the Department, which in turn refers the complaint to the appropriate designated agency. The proposed revisions to § 35.171 made it clear that an agency can refer a misdirected complaint either directly to the appropriate agency or to the Department. This amendment was intended to protect against the unnecessary backlogging of complaints and to prevent undue delay in an agency taking action on a complaint.

Several commenters supported this amendment as a more efficient means of directing title II complaints to the appropriate enforcing agency. One commenter requested that the Department emphasize the need for timeliness in referring a complaint. The Department does not believe it is appropriate to adopt a specific time frame but will continue to encourage designated agencies to make timely referrals. The final rule retains, with minor modifications, the language in proposed § 35.171(a)(2)(i). The Department has also amended § 35.171(a)(2)(ii) to be consistent with the changes in the rule at § 35.190(e), as discussed below.

## Section 35.172 Investigations and compliance reviews.

In the NPRM, the Department proposed a number of changes to language in § 35.172 relating to the resolution of complaints. Subtitle A of title II of the ADA defines the remedies, procedures, and rights provided for qualified individuals with disabilities who are discriminated against on the basis of disability in the services, programs, or activities of State and local governments. 42 U.S.C. 12131-12134. Subpart F of the current regulation establishes administrative procedures for the enforcement of title II of the ADA. 28 CFR 35.170-35.178. Subpart G identifies eight “designated agencies,” including the Department, that have responsibility for investigating complaints under title II. See 28 CFR 35.190(b).

The Department's 1991 title II regulation is based on the enforcement procedures established in regulations implementing section 504. Thus, the Department's 1991 title II regulation provides that the designated agency “shall investigate each complete complaint” alleging a violation of title II and shall “attempt informal resolution” of such complaint. 28 CFR 35.172(a). The full range of remedies (including compensatory damages) that are available to the Department when it resolves a complaint or resolves issues raised in a compliance review are available to designated agencies when they are engaged in informal complaint resolution or resolution of issues raised in a compliance review under title II.

In the years since the 1991 title II regulation went into effect, the Department has received many more complaints alleging violations of title II than its resources permit it to resolve. The Department has reviewed each complaint that the Department has received and directed its resources to resolving the most critical matters. In the NPRM, the Department proposed deleting the word “each” as it appears before “complaint” in § 35.172(a) of the 1991 title II regulation as a means of clarifying that designated agencies may exercise discretion in selecting title II complaints for resolution.

Many commenters opposed the removal of the term “each,” requesting that all title II complaints be investigated. The commenters explained that complaints against title II entities implicate the fundamental right of access to government facilities and programs, making an administrative enforcement mechanism critical. Rather than aligning enforcement discretion of title II complaints with the discretion under the enforcement procedures of title

III, the commenters favored obtaining additional resources to address more complaints. The commenters highlighted the advantage afforded by Federal involvement in complaint investigations in securing favorable voluntary resolutions. When Federal involvement results in settlement agreements, commenters believed those agreements are more persuasive to other public entities than private settlements. Private litigation as a viable alternative was rejected by the commenters because of the financial limitations of many complainants, and because in some scenarios legal barriers foreclose private litigation as an option.

Several of those opposing this amendment argued that designated agencies are required to investigate each complaint under section 504, and a departure for title II complaints would be an inconsistency. The Department believes that § 35.171(a) of the final rule is consistent with the obligation to evaluate all complaints. However, there is no statutory requirement that every title II complaint receive a full investigation. Section 203 of the ADA, 42 U.S.C. 12133, adopts the "remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973" (29 U.S.C. 794a). Section 505 of the Rehabilitation Act, in turn, incorporates the remedies available under title VI of the Civil Rights Act of 1964 into section 504. Under these statutes, agencies may engage in conscientious enforcement without fully investigating each citizen complaint. An agency's decision to conduct a full investigation requires a complicated balancing of a number of factors that are particularly within its expertise. Thus, the agency must not only assess whether a violation may have occurred, but also whether agency resources are best spent on this complaint or another, whether the agency is likely to succeed if it acts, and whether the particular enforcement action requested best fits the agency's overall policies. Availability of resources will always be a factor, and the Department believes discretion to maximize these limited resources will result in the most effective enforcement program. If agencies are bound to investigate each complaint fully, regardless of merit, such a requirement could have a deleterious effect on their overall enforcement efforts. The Department continues to expect that each designated agency will review the complaints the agency receives to determine whether further investigation is appropriate.

The Department also proposed revising § 35.172 to add a new paragraph (b) that provided explicit authority for compliance reviews consistent with the Department's longstanding position that such authority exists. The proposed section stated, "[t]he designated agency may conduct compliance reviews of public entities based on information indicating a possible failure to comply with the nondiscrimination requirements of this part." Several commenters supported this amendment, identifying title III compliance reviews as having been a successful means for the Department and designated agencies to improve accessibility. The Department has retained this section. However, the Department has modified the language of the section to make the authority to conduct compliance reviews consistent with that available under section 504 and title VI. See, e.g., 28 CFR 42.107(a). The new provision reads as follows: "(b) The designated agency may conduct compliance reviews of public entities in order to ascertain whether there has been a failure to comply with the nondiscrimination requirements of this part." The Department has also added a provision to § 35.172(c)(2) clarifying the Department's longstanding view that agencies may obtain compensatory damages on behalf of complainants as the result of a finding of discrimination pursuant to a compliance review or in informal resolution of a complaint.

Finally, in the NPRM, the Department proposed revising the requirements for letters of findings for clarification and to reflect current practice. Section 35.172(a) of the 1991 title II regulation required designated agencies to issue a letter of findings at the conclusion of an investigation if the complaint was not resolved informally, and to attempt to negotiate a voluntary compliance agreement if a violation was found. The Department's proposed changes to the 1991 title II regulation moved the discussion of letters of findings to a new paragraph (c) in the NPRM, and clarified that letters of findings are only required when a violation is found.

One commenter opposed the proposal to eliminate the obligation of the Department and designated agencies to issue letters of finding at the conclusion of every investigation. The commenter argued that it is beneficial for public entities, as well as complainants, for the Department to provide a reasonable explanation of both compliance and noncompliance findings.

The Department has considered this comment but continues to believe that this change will promote the overall effectiveness of its enforcement program. The final rule retains the proposed language.

## Subpart G—Designated Agencies

### Section 35.190 Designated agencies.

Subpart G of the 1991 title II regulation designates specific Federal agencies to investigate certain title II complaints. Paragraph 35.190(b) specifies these agency designations. Paragraphs 35.190(c) and (d), respectively, grant the Department discretion to designate further oversight responsibilities for matters not specifically assigned or where there are apparent conflicts of jurisdiction. The NPRM proposed adding a new § 35.190(e) further refining procedures for complaints filed with the Department of Justice. Proposed § 35.190(e) provides that when the Department receives a complaint alleging a violation of title II that is directed to the Attorney General but may fall within the jurisdiction of a designated agency or another Federal agency with jurisdiction under section 504, the Department may exercise its discretion to retain the complaint for investigation under this part. The Department would, of course, consult with the designated agency when the Department plans to retain a complaint. In appropriate circumstances, the Department and the designated agency may conduct a joint investigation.

Several commenters supported this amendment as a more efficient means of processing title II complaints. The commenters supported the Department using its discretion to conduct timely investigations of such complaints. The language of the proposed § 35.190(e) remains unchanged in the final rule.

## Other Issues

### Questions Posed in the NPRM Regarding Costs and Benefits of Complying With the 2010 Standards

In the NPRM, the Department requested comment on various cost and benefit issues related to eight requirements in the Department's Initial Regulatory Impact Analysis (Initial RIA), available at [ada.gov/NPRM2008/ria.htm](http://ada.gov/NPRM2008/ria.htm), that were projected to have incremental costs exceeding monetized benefits by more than \$100 million when using the 1991 Standards as the comparative baseline, *i.e.*, side reach, water closet clearances in single-user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses. 73 FR 34466, 34469 (June 17, 2008). The Department noted that pursuant to the ADA, the Department does not have statutory authority to modify the 2004 ADAAG and is required instead to issue regulations implementing the ADA that are consistent with the Board's guidelines. In that regard, the Department also requested comment about whether any of these eight elements in the 2010 Standards should be returned to the Access Board

for further consideration, in particular as applied to alterations. Many of the comments received by the Department in response to these questions addressed both titles II and III. As a result, the Department's discussion of these comments and its response are collectively presented for both titles.

**Side reach.** The 1991 Standards at section 4.2.6 establish a maximum side-reach height of 54 inches. The 2010 Standards at section 308.3 reduce that maximum height to 48 inches. The 2010 Standards also add exceptions for certain elements to the scoping requirement for operable parts.

The vast majority of comments the Department received were in support of the lower side-reach maximum of 48 inches in the 2010 Standards. Most of these comments, but not all, were received from individuals of short stature, relatives of individuals of short stature, or organizations representing the interests of persons with disabilities, including individuals of short stature. Comments from individuals with disabilities and disability advocacy groups stated that the 48-inch side reach would permit independence in performing many activities of daily living for individuals with disabilities, including individuals of short stature, persons who use wheelchairs, and persons who have limited upper body strength. In this regard, one commenter who is a business owner pointed out that as a person of short stature there were many occasions when he was unable to exit a public restroom independently because he could not reach the door handle. The commenter said that often elevator control buttons are out of his reach and, if he is alone, he often must wait for someone else to enter the elevator so that he can ask that person to press a floor button for him. Another commenter, who is also a person of short stature, said that he has on several occasions pulled into a gas station only to find that he was unable to reach the credit card reader on the gas pump. Unlike other customers who can reach the card reader, swipe their credit or debit cards, pump their gas and leave the station, he must use another method to pay for his gas. Another comment from a person of short stature pointed out that as more businesses take steps to reduce labor costs—a trend expected to continue—staffed booths are being replaced with automatic machines for the sale, for example, of parking tickets and other products. He observed that the “ability to access and operate these machines becomes ever more critical to function in society,” and, on that basis, urged the Department to adopt the 48-inch side-reach requirement. Another individual commented that persons of short stature should not have to carry with them adaptive tools in order to access building or facility elements that are out of their reach, any more than persons in wheelchairs should have to carry ramps with them in order to gain access to facilities.

Many of the commenters who supported the revised side-reach requirement pointed out that lowering the side-reach requirement to 48 inches would avoid a problem sometimes encountered in the built environment when an element was mounted for a parallel approach at 54 inches only to find afterwards that a parallel approach was not possible. Some commenters also suggested that lowering the maximum unobstructed side reach to 48 inches would reduce confusion among design professionals by making the unobstructed forward and side-reach maximums the same (the unobstructed forward reach in both the 1991 and 2010 Standards is 48 inches maximum). These commenters also pointed out that the ICC/ANSI A117.1 Standard, which is a private sector model accessibility standard, has included a 48-inch maximum high side-reach requirement since 1998. Many jurisdictions have already incorporated this requirement into their building codes, which these commenters believed would reduce the cost of compliance with the 2010 Standards. Because numerous jurisdictions have already adopted the 48-inch side-reach requirement, the Department's failure to adopt the 48-inch side-reach requirement in the 2010 Standards, in the view of many commenters, would result in a significant reduction in accessibility, and would frustrate efforts that have been made to harmonize private sector model construction and accessibility codes with Federal accessibility requirements. Given these concerns, they overwhelmingly opposed the idea of returning the revised side-reach requirement to the Access Board for further consideration.

The Department also received comments in support of the 48-inch side-reach requirement from an association of professional commercial property managers and operators and from State governmental entities. The association of property managers pointed out that the revised side-reach requirement provided a reasonable approach to "regulating elevator controls and all other operable parts" in existing facilities in light of the manner in which the safe harbor, barrier removal, and alterations obligations will operate in the 2010 Standards. One governmental entity, while fully supporting the 48-inch side-reach requirement, encouraged the Department to adopt an exception to the lower reach range for existing facilities similar to the exception permitted in the ICC/ANSI A117.1 Standard. In response to this latter concern, the Department notes that under the safe harbor, existing facilities that are in compliance with the 1991 Standards, which require a 54-inch side-reach maximum, would not be required to comply with the lower side-reach requirement, unless there is an alteration. See § 35.150(b)(2).

A number of commenters expressed either concern with, or opposition to, the 48-inch side-reach requirement and suggested that it be returned to the Access Board for further consideration. These commenters included trade and business associations, associations of retail stores, associations of restaurant owners, retail and convenience store chains, and a model code organization. Several businesses expressed the view that the lower side-reach requirement would discourage the use of their products and equipment by most of the general public. In particular, concerns were expressed by a national association of pay phone service providers regarding the possibility that pay telephones mounted at the lower height would not be used as frequently by the public to place calls, which would result in an economic burden on the pay phone industry. The commenter described the lower height required for side reach as creating a new "barrier" to pay phone use, which would reduce revenues collected from pay phones and, consequently, further discourage the installation of new pay telephones. In addition, the commenter expressed concern that phone service providers would simply decide to remove existing pay phones rather than incur the costs of relocating them at the lower height. With regard to this latter concern, the commenter misunderstood the manner in which the safe harbor obligation will operate in the revised title II regulation for elements that comply with the 1991 Standards. If the pay phones comply with the 1991 Standards or UFAS, the adoption of the 2010 Standards does not require retrofitting of these elements to reflect incremental changes in the 2010 Standards (see § 35.150(b)(2)). However, pay telephones that were required to meet the 1991 Standards as part of new construction or alterations, but do not in fact comply with those standards, will need to be brought into compliance with the 2010 Standards as of 18 months from the publication date of this final rule. See § 35.151(c)(5)(ii).

The Department does not agree with the concerns expressed by the commenter about reduced revenues from pay phones mounted at lower heights. The Department believes that, while given the choice some individuals may prefer to use a pay phone that is at a higher height, the availability of some phones at a lower height will not deter individuals from making needed calls.

The 2010 Standards will not require every pay phone to be installed or moved to a lowered height. The table accompanying section 217.2 of the 2010 Standards makes clear that, where one or more telephones are provided on a floor, level, or an exterior site, only one phone per floor, level, or exterior site must be placed at an accessible height. Similarly, where there is one bank of phones per floor, level, or exterior site, only one phone per floor, level, or exterior site must be accessible. And if there are two or more banks of phones per floor, level, or exterior site, only one phone per bank must be placed at an accessible height.

Another comment in opposition to the lower reach range requirement was submitted on behalf of a chain of convenience stores with fuel stops. The commenter expressed the concern that the 48-inch side reach "will make it uncomfortable for the majority of the public," including persons of taller stature who would need to stoop to use equipment such as fuel dispensers mounted at the lower height. The commenter

offered no objective support for the observation that a majority of the public would be rendered uncomfortable if, as required in the 2010 Standards, at least one of each type of fuel dispenser at a facility was made accessible in compliance with the lower reach range. Indeed, the Department received no comments from any individuals of tall stature expressing concern about accessible elements or equipment being mounted at the 48-inch height.

Several convenience store, restaurant, and amusement park commenters expressed concern about the burden the lower side-reach requirement would place on their businesses in terms of self-service food stations and vending areas if the 48-inch requirement were applied retroactively. The cost of lowering counter height, in combination with the lack of control businesses exercise over certain prefabricated service or vending fixtures, outweighed, they argued, any benefits to persons with disabilities. For this reason, they suggested the lower side-reach requirement be referred back to the Access Board.

These commenters misunderstood the safe harbor and barrier removal obligations that will be in effect under the 2010 Standards. Those existing self-service food stations and vending areas that already are in compliance with the 1991 Standards will not be required to satisfy the 2010 Standards unless they engage in alterations. With regard to prefabricated vending machines and food service components that will be purchased and installed in businesses after the 2010 Standards become effective, the Department expects that companies will design these machines and fixtures to comply with the 2010 Standards in the future, as many have already done in the 10 years since the 48-inch side-reach requirement has been a part of the model codes and standards used by many jurisdictions as the basis for their construction codes.

A model code organization commented that the lower side-reach requirement would create a significant burden if it required entities to lower the mounting height for light switches, environmental controls, and outlets when an alteration did not include the walls where these elements were located, such as when "an area is altered or as a path of travel obligation." The Department believes that the final rule adequately addresses those situations about which the commenter expressed concern by not requiring the relocation of existing elements, such as light switches, environmental controls, and outlets, unless they are altered. Moreover, under § 35.151(b)(4)(iii) of the final rule, costs for altering the path of travel to an altered area of primary function that exceed 20 percent of the overall costs of the alteration will be deemed disproportionate.

The Department has determined that the revised side-reach requirement should not be returned to the Access Board for further consideration, based in large part on the views expressed by a majority of the commenters regarding the need for, and importance of, the lower side-reach requirement to ensure access for persons with disabilities.

## Alterations and Water Closet Clearances in Single-User Toilet Rooms With In-Swinging Doors

The 1991 Standards allow a lavatory to be placed a minimum of 18 inches from the water closet centerline and a minimum of 36 inches from the side wall adjacent to the water closet, which precludes side transfers. The 1991 Standards do not allow an in-swinging door in a toilet or bathing room to overlap the required clear floor space at any accessible fixture. To allow greater transfer options, section 604.3.2 of the 2010 Standards prohibits lavatories from overlapping the clear floor space at water closets, except in residential dwelling units. Section 603.2.3 of the 2010 Standards maintains the prohibition on doors swinging into the clear floor space or clearance required for any fixture, except that they permit the doors

of toilet or bathing rooms to swing into the required turning space, provided that there is sufficient clearance space for the wheelchair outside the door swing. In addition, in single-user toilet or bathing rooms, exception 2 of section 603.2.3 of the 2010 Standards permits the door to swing into the clear floor space of an accessible fixture if a clear floor space that measures at least 30 inches by 48 inches is available outside the arc of the door swing.

The majority of commenters believed that this requirement would increase the number of toilet rooms accessible to individuals with disabilities who use wheelchairs or mobility scooters, and will make it easier for them to transfer. A number of commenters stated that there was no reason to return this provision to the Access Board. Numerous commenters noted that this requirement is already included in other model accessibility standards and many State and local building codes and that the adoption of the 2010 Standards is an important part of harmonization efforts.

Other commenters, mostly trade associations, opposed this requirement, arguing that the added cost to the industry outweighs any increase in accessibility. Two commenters stated that these proposed requirements would add two feet to the width of an accessible single-user toilet room; however, another commenter said the drawings in the proposed regulation demonstrated that there would be no substantial increase in the size of the toilet room. Several commenters stated that this requirement would require moving plumbing fixtures, walls, or doors at significant additional expense. Two commenters wanted the permissible overlap between the door swing and clearance around any fixture eliminated. One commenter stated that these new requirements will result in fewer alterations to toilet rooms to avoid triggering the requirement for increased clearances, and suggested that the Department specify that repairs, maintenance, or minor alterations would not trigger the need to provide increased clearances. Another commenter requested that the Department exempt existing guest room bathrooms and single-user toilet rooms that comply with the 1991 Standards from complying with the increased clearances in alterations.

After careful consideration of these comments, the Department believes that the revised clearances for single-user toilet rooms will allow safer and easier transfers for individuals with disabilities, and will enable a caregiver, aide, or other person to accompany an individual with a disability into the toilet room to provide assistance. The illustrations in Appendix B to the final title III rule, "Analysis and Commentary on the 2010 ADA Standards for Accessible Design," published elsewhere in this volume and codified as Appendix B to 28 CFR part 36, describe several ways for public entities and public accommodations to make alterations while minimizing additional costs or loss of space. Further, in any isolated instances where existing structural limitations may entail loss of space, the public entity and public accommodation may have a technical infeasibility defense for that alteration. The Department also recognizes that in attempting to create the required clear floor space pursuant to section 604.3.2, there may be certain specific circumstances where it would be technically infeasible for a covered entity to comply with the clear floor space requirement, such as where an entity must move a plumbing wall in a multistory building where the mechanical chase for plumbing is an integral part of a building's structure or where the relocation of a wall or fixture would violate applicable plumbing codes. In such circumstances, the required clear floor space would not have to be provided although the covered entity would have to provide accessibility to the maximum extent feasible. The Department has, therefore, decided not to return this requirement to the Access Board.

**Alterations to stairs.** The 1991 Standards only require interior and exterior stairs to be accessible when they provide access to levels that are not connected by an elevator, ramp, or other accessible means of vertical access. In contrast, section 210.1 of the 2010 Standards requires all newly constructed stairs that are part of a means of egress to be accessible. However, exception 2 of section 210.1 of the 2010 Standards provides that in alterations, stairs between levels connected by an accessible route need not be

accessible, except that handrails shall be provided. Most commenters were in favor of this requirement for handrails in alterations, and stated that adding handrails to stairs during alterations was not only feasible and not cost-prohibitive, but also provided important safety benefits. One commenter stated that making all points of egress accessible increased the number of people who could use the stairs in an emergency. A majority of the commenters did not want this requirement returned to the Access Board for further consideration.

The International Building Code (IBC), which is a private sector model construction code, contains a similar provision, and most jurisdictions enforce a version of the IBC as their building code, thereby minimizing the impact of this provision on public entities and public accommodations. The Department believes that by requiring only the addition of handrails to altered stairs where levels are connected by an accessible route, the costs of compliance for public entities and public accommodations are minimized, while safe egress for individuals with disabilities is increased. Therefore, the Department has decided not to return this requirement to the Access Board.

**Alterations to elevators.** Under the 1991 Standards, if an existing elevator is altered, only that altered elevator must comply with the new construction requirements for accessible elevators to the maximum extent feasible. It is therefore possible that a bank of elevators controlled by a single call system may contain just one accessible elevator, leaving an individual with a disability with no way to call an accessible elevator and thus having to wait indefinitely until an accessible elevator happens to respond to the call system. In the 2010 Standards, when an element in one elevator is altered, section 206.6.1 will require the same element to be altered in all elevators that are programmed to respond to the same call button as the altered elevator.

Most commenters favored the proposed requirement. This requirement, according to these commenters, is necessary so a person with a disability need not wait until an accessible elevator responds to his or her call. One commenter suggested that elevator owners could also comply by modifying the call system so the accessible elevator could be summoned independently. One commenter suggested that this requirement would be difficult for small businesses located in older buildings, and one commenter suggested that this requirement be sent back to the Access Board.

After considering the comments, the Department agrees that this requirement is necessary to ensure that when an individual with a disability presses a call button, an accessible elevator will arrive in a timely manner. The IBC contains a similar provision, and most jurisdictions enforce a version of the IBC as their building code, minimizing the impact of this provision on public entities and public accommodations. Public entities and businesses located in older buildings need not comply with this requirement where it is technically infeasible to do so. Further, as pointed out by one commenter, modifying the call system so the accessible elevator can be summoned independently is another means of complying with this requirement in lieu of altering all other elevators programmed to respond to the same call button. Therefore, the Department has decided not to return this requirement to the Access Board.

**Location of accessible routes to stages.** The 1991 Standards at section 4.33.5 require an accessible route to connect the accessible seating and the stage, as well as other ancillary spaces used by performers. The 2010 Standards at section 206.2.6 provide in addition that where a circulation path directly connects the seating area and the stage, the accessible route must directly connect the accessible seating and the stage, and, like the 1991 Standards, an accessible route must connect the stage with the ancillary spaces used by performers.

In the NPRM, the Department asked operators of auditoria about the extent to which auditoria already provide direct access to stages and whether there were planned alterations over the next 15 years that included accessible direct routes to stages. The Department also asked how to quantify the benefits of

this requirement for persons with disabilities, and invited commenters to provide illustrative anecdotal experiences about the requirement's benefits. The Department received many comments regarding the costs and benefits of this requirement. Although little detail was provided, many industry and governmental entity commenters anticipated that the costs of this requirement would be great and that it would be difficult to implement. They noted that premium seats may have to be removed and that load-bearing walls may have to be relocated. These commenters suggested that the significant costs would deter alterations to the stage area for a great many auditoria. Some commenters suggested that ramps to the front of the stage may interfere with means of egress and emergency exits. Several commenters requested that the requirement apply to new construction only, and one industry commenter requested an exemption for stages used in arenas or amusement parks where there is no audience participation or where the stage is a work area for performers only. One commenter requested that the requirement not apply to temporary stages.

The final rule does not require a direct accessible route to be constructed where a direct circulation path from the seating area to the stage does not exist. Consequently, those commenters who expressed concern about the burden imposed by the revised requirement (i.e., where the stage is constructed with no direct circulation path connecting the general seating and performing area) should note that the final rule will not require the provision of a direct accessible route under these circumstances. The final rule applies to permanent stages, as well as "temporary stages," if there is a direct circulation path from the seating area to the stage. However, the Department does recognize that in some circumstances, such as an alteration to a primary function area, the ability to provide a direct accessible route to a stage may be costly or technically infeasible, the auditorium owner is not precluded by the revised requirement from asserting defenses available under the regulation. In addition, the Department notes that since section 4.33.5 of the 1991 Standards requires an accessible route to a stage, the safe harbor will apply to existing facilities whose stages comply with the 1991 Standards.

Several governmental entities supported accessible auditoria and the revised requirement. One governmental entity noted that its State building code already required direct access, that it was possible to provide direct access, and that creative solutions had been found to do so.

Many advocacy groups and individual commenters strongly supported the revised requirement, discussing the acute need for direct access to stages as it impacts a great number of people at important life events such as graduations and awards ceremonies, at collegiate and competitive performances and other school events, and at entertainment events that include audience participation. Many commenters expressed the belief that direct access is essential for integration mandates to be satisfied and that separate routes are stigmatizing and unequal. The Department agrees with these concerns.

Commenters described the impact felt by persons in wheelchairs who are unable to access the stage at all when others are able to do so. Some of these commenters also discussed the need for performers and production staff who use wheelchairs to have direct access to the stage and provided a number of examples that illustrated the importance of the rule proposed in the NPRM. Personal anecdotes were provided in comments and at the Department's public hearing on the NPRM. One mother spoke passionately and eloquently about the unequal treatment experienced by her daughter, who uses a wheelchair, at awards ceremonies and band concerts. Her daughter was embarrassed and ashamed to be carried by her father onto a stage at one band concert. When the venue had to be changed for another concert to an accessible auditorium, the band director made sure to comment that he was unhappy with the switch. Rather than endure the embarrassment and indignities, her child dropped out of band the following year. Another father commented about how he was unable to speak from the stage at a PTA meeting at his child's school. Speaking from the floor limited his line of sight and his participation. Several examples were provided of children who could not participate on stage during graduation, awards

programs, or special school events, such as plays and festivities. One student did not attend his college graduation because he would not be able to get on stage. Another student was unable to participate in the class Christmas programs or end-of-year parties unless her father could attend and lift her onto the stage. These commenters did not provide a method to quantify the benefits that would accrue by having direct access to stages. One commenter stated, however, that "the cost of dignity and respect is without measure."

Many industry commenters and governmental entities suggested that the requirement be sent back to the Access Board for further consideration. One industry commenter mistakenly noted that some international building codes do not incorporate the requirement and that therefore there is a need for further consideration. However, the Department notes that both the 2003 and 2006 editions of the IBC include scoping provisions that are almost identical to this requirement and that these editions of the model code are the most frequently used. Many individuals and advocacy group commenters requested that the requirement be adopted without further delay. These commenters spoke of the acute need for direct access to stages and the amount of time it would take to resubmit the requirement to the Access Board. Several commenters noted that the 2004 ADAAG tracks recent model codes and thus there is no need for further consideration. The Department agrees that no further delay is necessary and therefore has decided not to return the requirement to the Access Board for further consideration.

**Attorney areas and witness stands.** The 1991 Standards do not require that public entities meet specific architectural standards with regard to the construction and alteration of courtrooms and judicial facilities. Because it is apparent that the judicial facilities of State and local governments have often been inaccessible to individuals with disabilities, as part of the NPRM, the Department proposed the adoption of sections 206.2.4, 231.2, 808, 304, 305, and 902 of the 2004 ADAAG concerning judicial facilities and courtrooms, including requirements for accessible courtroom stations and accessible jury boxes and witness stands.

Those who commented on access to judicial facilities and courtrooms uniformly favored the adoption of the 2010 Standards. Virtually all of the commenters stated that accessible judicial facilities are crucial to ensuring that individuals with disabilities are afforded due process under law and have an equal opportunity to participate in the judicial process. None of the commenters favored returning this requirement to the Access Board for further consideration.

The majority of commenters, including many disability rights and advocacy organizations, stated that it is crucial for individuals with disabilities to have effective and meaningful access to our judicial system so as to afford them due process under law. They objected to asking the Access Board to reconsider this requirement. In addition to criticizing the initial RIA for virtually ignoring the intangible and non-monetary benefits associated with accessible courtrooms, these commenters frequently cited the Supreme Court's decision in *Tennessee v. Lane*, 541 U.S. 509, 531 (2004),<sup>[4]</sup> as ample justification for the requirement, noting the Court's finding that "[t]he unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination." *Id.* at 531. These commenters also made a number of observations, including the following: providing effective access to individuals with mobility impairments is not possible when architectural barriers impede their path of travel and negatively emphasize an individual's disability; the perception generated by makeshift accommodations discredits witnesses and attorneys with disabilities, who should not be stigmatized or treated like second-class citizens; the cost of accessibility modifications to existing courthouses can often be significantly decreased by planning ahead, by focusing on low-cost options that provide effective access, and by addressing existing barriers when reasonable modifications to the courtroom can be made; by planning ahead and by following best practices, jurisdictions can avoid those situations where it is apparent that someone's disability is the

reason why ad hoc arrangements have to be made prior to the beginning of court proceedings; and accessibility should be a key concern during the planning and construction process so as to ensure that both courtroom grandeur and accessibility are achieved. One commenter stated that, in order for attorneys with disabilities to perform their professional duties to their clients and the court, it is essential that accessible courtrooms, conference rooms, law libraries, judicial chambers, and other areas of a courthouse be made barrier-free by taking accessible design into account prior to construction.

Numerous commenters identified a variety of benefits that would accrue as a result of requiring judicial facilities to be accessible. These included the following: maintaining the decorum of the courtroom and eliminating the disruption of court proceedings when individuals confront physical barriers; providing an accessible route to the witness stand and attorney area and clear floor space to accommodate a wheelchair within the witness area; establishing crucial lines of sight between the judge, jury, witnesses, and attorneys—which commenters described as crucial; ensuring that the judge and the jury will not miss key visual indicators of a witness; maintaining a witness's or attorney's dignity and credibility; shifting the focus from a witness's disability to the substance of that person's testimony; fostering the independence of an individual with disability; allowing persons with mobility impairments to testify as witnesses, including as expert witnesses; ensuring the safety of various participants in a courtroom proceeding; and avoiding unlawful discrimination. One commenter stated that equal access to the well of the courtroom for both attorney and client is important for equal participation and representation in our court system. Other commenters indicated that accessible judicial facilities benefit a wide range of people, including many persons without disabilities, senior citizens, parents using strollers with small children, and attorneys and court personnel wheeling documents into the courtroom. One commenter urged the adoption of the work area provisions because they would result in better workplace accessibility and increased productivity. Several commenters urged the adoption of the rule because it harmonizes the ADAAG with the model IBC, the standards developed by the American National Standards Institute (ANSI), and model codes that have been widely adopted by State and local building departments, thus increasing the prospects for better understanding and compliance with the ADAAG by architects, designers, and builders.

Several commenters mentioned the report “Justice for All: Designing Accessible Courthouses” (Nov. 15, 2006), available at <http://www.access-board.gov/caac/report.htm> (Nov. 24, 2009) (last visited June 24, 2010). The report, prepared by the Courthouse Access Advisory Committee for the Access Board, contained recommendations for the Board's use in developing and disseminating guidance on accessible courthouse design under the ADA and the ABA. These commenters identified some of the report's best practices concerning courtroom accessibility for witness stands, jury boxes, and attorney areas; addressed the costs and benefits arising from the use of accessible courtrooms; and recommended that the report be incorporated into the Department's final rule. With respect to existing courtrooms, one commenter in this group suggested that consideration be given to ensuring that there are barrier-free emergency evacuation routes for all persons in the courtroom, including different evacuation routes for different classes of individuals given the unique nature of judicial facilities and courtrooms.

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[4] The Supreme Court in *Tennessee v. Lane*, 541 U.S. 509, 533-534 (2004), held that title II of the ADA constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment in cases implicating the fundamental right of access to the courts.

The Department declines to incorporate the report into the regulation. However, the Department encourages State and local governments to consult the Committee report as a useful guide on ways to facilitate and increase accessibility of their judicial facilities. The report includes many excellent examples of accessible courtroom design.

One commenter proposed that the regulation also require a sufficient number of accessible benches for judges with disabilities. Under section 206.2.4 of the 2004 ADAAG, raised courtroom stations used by judges and other judicial staff are not required to provide full vertical access when first constructed or altered, as long as the required clear floor space, maneuvering space, and any necessary electrical service for future installation of a means of vertical access, is provided at the time of new construction or can be achieved without substantial reconstruction during alterations. The Department believes that this standard easily allows a courtroom station to be adapted to provide vertical access in the event a judge requires an accessible judge's bench.

The Department received several anecdotal accounts of courtroom experiences of individuals with disabilities. One commenter recalled numerous difficulties that her law partner faced as the result of inaccessible courtrooms, and their concerns that the attention of judge and jury was directed away from the merits of case to the lawyer and his disability. Among other things, the lawyer had to ask the judges on an appellate panel to wait while he maneuvered through insufficient space to the counsel table; ask judges to relocate bench conferences to accessible areas; and make last-minute preparations and rearrangements that his peers without disabilities did not have to make. Another commenter with extensive experience as a lawyer, witness, juror, and consultant observed that it is common practice for a witness who uses mobility devices to sit in front of the witness stand. He described how disconcerting and unsettling it has been for him to testify in front of the witness stand, which allowed individuals in the courtroom to see his hands or legs shaking because of spasticity, making him feel like a second-class citizen.

Two other commenters with mobility disabilities described their experiences testifying in court. One accessibility consultant stated that she was able to represent her clients successfully when she had access to an accessible witness stand because it gave her the ability "to look the judge in the eye, speak comfortably and be heard, hold up visual aids that could be seen by the judge, and perform without an architectural stigma." She did not believe that she was able to achieve a comparable outcome or have meaningful access to the justice system when she testified from an inaccessible location. Similarly, a licensed clinical social worker indicated that she has testified in several cases in accessible courtrooms, and that having full access to the witness stand in the presence of the judge and the jury was important to her effectiveness as an expert witness. She noted that accessible courtrooms often are not available, and that she was aware of instances in which victims, witnesses, and attorneys with disabilities have not been able to obtain needed disability accommodations in order to fulfill their roles at trial.

Two other commenters indicated that they had been chosen for jury duty but that they were effectively denied their right to participate as jurors because the courtrooms were not accessible. Another commenter indicated that he has had to sit apart from the other jurors because the jury box was inaccessible.

A number of commenters expressed approval of actions taken by States to facilitate access in judicial facilities. A member of a State commission on disability noted that the State had been working toward full accessibility since 1997 when the Uniform Building Code required interior accessible routes. This commenter stated that the State's district courts had been renovated to the maximum extent feasible to provide greater access. This commenter also noted that a combination of Community Development Block Grant money and State funds are often awarded for renovations of courtroom areas. One advocacy group

that has dealt with court access issues stated that members of the State legal community and disability advocates have long been promoting efforts to ensure that the State courts are accessible to individuals with disabilities. The comment cited a publication distributed to the Washington State courts by the State bar association entitled, "Ensuring Equal Access to the Courts for Persons with Disabilities." (Aug. 2006), available at <http://www.wsba.org/ensuringaccessguidebook.pdf> (last visited July 20, 2010). In addition, the commenter also indicated that the State supreme court had promulgated a new rule governing how the courts should respond to requests of accommodation based upon disability; the State legislature had created the position of Disability Access Coordinator for Courts to facilitate accessibility in the court system; and the State legislature had passed a law requiring that all planned improvements and alterations to historic courthouses be approved by the ADA State facilities program manager and committee in order to ensure that the alterations will enhance accessibility.

The Department has decided to adopt the requirements in the 2004 ADAAG with respect to judicial facilities and courtrooms and will not ask the Access Board to review these requirements. The final rule is wholly consistent with the objectives of the ADA. It addresses a well-documented history of discrimination with respect to judicial administration and significantly increases accessibility for individuals with disabilities. It helps ensure that they will have an opportunity to participate equally in the judicial process. As stated, the final rule is consistent with a number of model and local building codes that have been widely adopted by State and local building departments and provides greater uniformity for planners, architects, and builders.

**Assistive listening systems.** The 1991 Standards at sections 4.33.6 and 4.33.7 require assistive listening systems (ALS) in assembly areas and prescribe general performance standards for ALS systems. In the NPRM, the Department proposed adopting the technical specifications in the 2004 ADAAG for ALS that are intended to ensure better quality and effective delivery of sound and information for persons with hearing impairments, especially those using hearing aids. The Department noted in the NPRM that since 1991, advancements in ALS and the advent of digital technology have made these systems more amenable to uniform standards, which, among other things, should ensure that a certain percentage of required ALS systems are hearing-aid compatible. 73 FR 34466, 34471 (June 17, 2008). The 2010 Standards at section 219 provide scoping requirements and at section 706 address receiver jacks, hearing aid compatibility, sound pressure level, signal-to-noise ratio, and peak clipping level. The Department requested comments specifically from arena and assembly area administrators on the cost and maintenance issues associated with ALS, asked generally about the costs and benefits of ALS, and asked whether, based upon the expected costs of ALS, the issue should be returned to the Access Board for further consideration.

Comments from advocacy organizations noted that persons who develop significant hearing loss often discontinue their normal routines and activities, including meetings, entertainment, and large group events, due to a sense of isolation caused by the hearing loss or embarrassment. Individuals with longstanding hearing loss may never have participated in group activities for many of the same reasons. Requiring ALS may allow individuals with disabilities to contribute to the community by joining in government and public events, and increasing economic activity associated with community activities and entertainment. Making public events and entertainment accessible to persons with hearing loss also brings families and other groups that include persons with hearing loss into more community events and activities, thus exponentially increasing the benefit from ALS.

Many commenters noted that when a person has significant hearing loss, that person may be able to hear and understand information in a quiet situation with the use of hearing aids or cochlear implants; however, as background noise increases and the distance between the source of the sound and the listener grows, and especially where there is distortion in the sound, an ALS becomes essential for basic

comprehension and understanding. Commenters noted that among the 31 million Americans with hearing loss, and with a projected increase to over 78 million Americans with hearing loss by 2030, the benefit from ALS is huge and growing. Advocates for persons with disabilities and individuals commented that they appreciated the improvements in the 2004 ADAAG standards for ALS, including specifications for the ALS systems and performance standards. They noted that neckloops that translate the signal from the ALS transmitter to a frequency that can be heard on a hearing aid or cochlear implant are much more effective than separate ALS system headsets, which sometimes create feedback, often malfunction, and may create distractions for others seated nearby. Comments from advocates and users of ALS systems consistently noted that the Department's regulation should, at a minimum, be consistent with the 2004 ADAAG. Although there were requests for adjustments in the scoping requirements from advocates seeking increased scoping requirements, and from large venue operators seeking fewer requirements, there was no significant concern expressed by commenters about the technical specifications for ALS in the 2004 ADAAG.

Some commenters from trade associations and large venue owners criticized the scoping requirements as too onerous and one commenter asked for a remand to the Access Board for new scoping rules. However, one State agency commented that the 2004 ADAAG largely duplicates the requirements in the 2006 IBC and the 2003 ANSI codes, which means that entities that comply with those standards would not incur additional costs associated with ADA compliance.

According to one State office of the courts, the cost to install either an infrared system or an FM system at average-sized facilities, including most courtrooms covered by title II, would be between \$500 and \$2,000, which the agency viewed as a small price in comparison to the benefits of inclusion. Advocacy organizations estimated wholesale costs of ALS systems at about \$250 each and individual neckloops to link the signal from the ALS transmitter to hearing aids or cochlear implants at less than \$50 per unit. Many commenters pointed out that if a facility already is using induction neckloops, it would already be in compliance and would not have any additional installation costs. One major city commented that annual maintenance is about \$2,000 for the entire system of performance venues in the city. A trade association representing very large venues estimated annual maintenance and upkeep expenses, including labor and replacement parts, to be at most about \$25,000 for a very large professional sports stadium.

One commenter suggested that the scoping requirements for ALS in the 2004 ADAAG were too stringent and that the Department should return them to the Access Board for further review and consideration. Others commented that the requirement for new ALS systems should mandate multichannel receivers capable of receiving audio description for persons who are blind, in addition to a channel for amplification for persons who are hard of hearing. Some comments suggested that the Department should require a set schedule and protocol of mandatory maintenance. Department regulations already require maintenance of accessible features at § 35.133(a) of the title II regulation, which obligates a title II entity to maintain ALS in good working order. The Department recognizes that maintenance of ALS is key to its usability. Necessary maintenance will vary dramatically from venue to venue based upon a variety of factors including frequency of use, number of units, quality of equipment, and others items. Accordingly, the Department has determined that it is not appropriate to mandate details of maintenance, but notes that failure to maintain ALS would violate § 35.133(a) of this rule.

The NPRM asked whether the Department should return the issue of ALS requirements to the Access Board. The Department has received substantial feedback on the technical and scoping requirements for ALS and is convinced that these requirements are reasonable and that the benefits justify the requirements. In addition, the Department believes that the new specifications will make ALS work more effectively for more persons with disabilities, which, together with a growing population of new users, will

increase demand for ALS, thus mooted criticism from some large venue operators about insufficient demand. Thus, the Department has determined that it is unnecessary to refer this issue back to the Access Board for reconsideration.

**Accessible teeing grounds, putting greens, and weather shelters.** In the NPRM, the Department sought public input on the proposed requirements for accessible golf courses. These requirements specifically relate to accessible routes within the boundaries of courses, as well as the accessibility of golfing elements (e.g., teeing grounds, putting greens, weather shelters).

In the NPRM, the Department sought information from the owners and operators of golf courses, both public and private, on the extent to which their courses already have golf car passages, and, if so, whether they intended to avail themselves of the proposed accessible route exception for golf car passages. 73 FR 34466, 34471 (June 17, 2008).

Most commenters expressed support for the adoption of an accessible route requirement that includes an exception permitting golf car passage as all or part of an accessible route. Comments in favor of the proposed standard came from golf course owners and operators, individuals, organizations, and disability rights groups, while comments opposing adoption of the golf course requirements generally came from golf courses and organizations representing the golf course industry.

The majority of commenters expressed the general viewpoint that nearly all golf courses provide golf cars and have either well-defined paths or permit golf cars to drive on the course where paths are not present, thus meeting the accessible route requirement. Several commenters disagreed with the assumption in the initial RIA, that virtually every tee and putting green on an existing course would need to be regraded in order to provide compliant accessible routes. According to one commenter, many golf courses are relatively flat with little slope, especially those heavily used by recreational golfers. This commenter concurred with the Department that it is likely that most existing golf courses have a golf car passage to tees and greens, thereby substantially minimizing the cost of bringing an existing golf course into compliance with the proposed standards. One commenter reported that golf course access audits found that the vast majority of public golf courses would have little difficulty in meeting the proposed golf course requirements. In the view of some commenters, providing access to golf courses would increase golf participation by individuals with disabilities.

The Department also received many comments requesting clarification of the term "golf car passage." For example, one commenter requesting clarification of the term "golf car passage" argued that golf courses typically do not provide golf car paths or pedestrian paths onto the actual teeing grounds or greens, many of which are higher or lower than the car path. This commenter argued that if golf car passages were required to extend onto teeing grounds and greens in order to qualify for an exception, then some golf courses would have to substantially regrade teeing grounds and greens at a high cost.

After careful consideration of the comments, the Department has decided to adopt the 2010 Standards specific to golf facilities. The Department believes that in order for individuals with mobility disabilities to have an opportunity to play golf that is equal to golfers without disabilities, it is essential that golf courses provide an accessible route or accessible golf car passage to connect accessible elements and spaces within the boundary of the golf course, including teeing grounds, putting greens, and weather shelters.

## Public Comments on Other NPRM Issues

**Equipment and furniture.** In the 1991 title II regulation, there are no specific provisions addressing equipment and furniture, although § 35.150(b) states that one means by which a public entity can make its program accessible to individuals with disabilities is "redesign of equipment." In the NPRM, the Department

announced its intention not to regulate equipment, proposing instead to continue with the current approach, under which equipment and furniture are covered by other provisions, including those requiring reasonable modifications of policies, practices, or procedures, program accessibility, and effective communication. The Department suggested that entities apply the accessibility standards for fixed equipment in the 2004 ADAAG to analogous free-standing equipment in order to ensure that such equipment is accessible, and that entities consult relevant portions of the 2004 ADAAG and standards from other Federal agencies to make equipment accessible to individuals who are blind or have low vision (e.g., the communication-related standards for ATMs in the 2004 ADAAG).

The Department received numerous comments objecting to this decision and urging the Department to issue equipment and furniture regulations. Based on these comments, the Department has decided that it needs to revisit the issuance of equipment and furniture regulations and it intends to do so in future rulemaking.

Among the commenters' key concerns, many from the disability community and some public entities, were objections to the Department's earlier decision not to issue equipment regulations, especially for medical equipment. These groups recommended that the Department list by name certain types of medical equipment that must be accessible, including exam tables (that lower to 15 inches above floor or lower), scales, medical and dental chairs, and radiologic equipment (including mammography equipment). These commenters emphasized that the provision of medically related equipment and furniture should also be specifically regulated since they are not included in the 2004 ADAAG (while depositories, change machines, fuel dispensers, and ATMs were) and because of their crucial role in the provision of healthcare. Commenters described how the lack of accessible medical equipment negatively affects the health of individuals with disabilities. For example, some individuals with mobility disabilities do not get thorough medical care because their health providers do not have accessible examination tables or scales.

Commenters also said that the Department's stated plan to assess the financial impact of free-standing equipment on businesses was not necessary, as any regulations could include a financial balancing test. Other commenters representing persons who are blind or have low vision urged the Department to mandate accessibility for a wide range of equipment—including household appliances (stoves, washers, microwaves, and coffee makers), audiovisual equipment (stereos and DVD players), exercise machines, vending equipment, ATMs, computers at Internet cafes or hotel business centers, reservations kiosks at hotels, and point-of-sale devices—through speech output and tactile labels and controls. They argued that modern technology allows such equipment to be made accessible at minimal cost. According to these commenters, the lack of such accessibility in point-of-sale devices is particularly problematic because it forces blind individuals to provide personal or sensitive information (such as personal identification numbers) to third parties, which exposes them to identity fraud. Because the ADA does not apply directly to the manufacture of products, the Department lacks the authority to issue design requirements for equipment designed exclusively for use in private homes. See Department of Justice, *Americans with Disabilities Act, ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities*, III-4.4200, available at <http://www.ada.gov/taman3>.

Some commenters urged the Department to require swimming pool operators to provide aquatic wheelchairs for the use of persons with disabilities when the swimming pool has a sloped entry. If there is a sloped entry, a person who uses a wheelchair would require a wheelchair designed for use in the water in order to gain access to the pool because taking a personal wheelchair into water would rust and corrode the metal on the chair and damage any electrical components of a power wheelchair. Providing an aquatic wheelchair made of non-corrosive materials and designed for access into the water will protect the water from contamination and avoid damage to personal wheelchairs or other mobility aids.

Additionally, many commenters urged the Department to regulate the height of beds in accessible hotel guest rooms and to ensure that such beds have clearance at the floor to accommodate a mechanical lift. These commenters noted that in recent years, hotel beds have become higher as hotels use thicker mattresses, thereby making it difficult or impossible for many individuals who use wheelchairs to transfer onto hotel beds. In addition, many hotel beds use a solid-sided platform base with no clearance at the floor, which prevents the use of a portable lift to transfer an individual onto the bed. Consequently, individuals who bring their own lift to transfer onto the bed cannot independently get themselves onto the bed. Some commenters suggested various design options that might avoid these situations.

The Department intends to provide specific guidance relating to both hotel beds and aquatic wheelchairs in a future rulemaking. For the present, the Department reminds covered entities that they have an obligation to undertake reasonable modifications to their current policies and to make their programs accessible to persons with disabilities. In many cases, providing aquatic wheelchairs or adjusting hotel bed heights may be necessary to comply with those requirements.

The Department has decided not to add specific scoping or technical requirements for equipment and furniture in this final rule. Other provisions of the regulation, including those requiring reasonable modifications of policies, practices, or procedures, program accessibility, and effective communication may require the provision of accessible equipment in individual circumstances. The 1991 title II regulation at § 35.150(a) requires that entities operate each service, program, or activity so that, when viewed in its entirety, each is readily accessible to, and usable by, individuals with disabilities, subject to a defense of fundamental alteration or undue financial and administrative burdens. Section 35.150(b) specifies that such entities may meet their program accessibility obligation through the "redesign of equipment." The Department expects to undertake a rulemaking to address these issues in the near future.

**Accessible golf cars.** An accessible golf car means a device that is designed and manufactured to be driven on all areas of a golf course, is independently usable by individuals with mobility disabilities, has a hand-operated brake and accelerator, carries golf clubs in an accessible location, and has a seat that both swivels and raises to put the golfer in a standing or semi-standing position.

The 1991 title II regulation contained no language specifically referencing accessible golf cars. After considering the comments addressing the ANPRM's proposed requirement that golf courses make at least one specialized golf car available for the use of individuals with disabilities, and the safety of accessible golf cars and their use on golf course greens, the Department stated in the NPRM that it would not issue regulations specific to golf cars.

The Department received many comments in response to its decision to propose no new regulation specific to accessible golf cars. The majority of commenters urged the Department to require golf courses to provide accessible golf cars. These comments came from individuals, disability advocacy and recreation groups, a manufacturer of accessible golf cars, and representatives of local government. Comments supporting the Department's decision not to propose a new regulation came from golf course owners, associations, and individuals.

Many commenters argued that while the existing title II regulation covered the issue, the Department should nonetheless adopt specific regulatory language requiring golf courses to provide accessible golf cars. Some commenters noted that many local governments and park authorities that operate public golf courses have already provided accessible golf cars. Experience indicates that such golf cars may be used without damaging courses. Some argued that having accessible golf cars would increase golf course revenue by enabling more golfers with disabilities to play the game. Several commenters requested that the Department adopt a regulation specifically requiring each golf course to provide one or more accessible golf cars. Other commenters recommended allowing golf courses to make "pooling"

arrangements to meet demands for such cars. A few commenters expressed support for using accessible golf cars to accommodate golfers with and without disabilities. Commenters also pointed out that the Departments of the Interior and Defense have already mandated that golf courses under their jurisdictional control must make accessible golf cars available unless it can be demonstrated that doing so would change the fundamental nature of the game.

While an industry association argued that at least two models of accessible golf cars meet the specifications recognized in the field, and that accessible golf cars cause no more damage to greens or other parts of golf courses than players standing or walking across the course, other commenters expressed concerns about the potential for damage associated with the use of accessible golf cars. Citing safety concerns, golf organizations recommended that an industry safety standard be developed.

Although the Department declines to add specific scoping or technical requirements for golf cars to this final rule, the Department expects to address requirements for accessible golf cars in future rulemaking. In the meantime, the Department believes that golfers with disabilities who need accessible golf cars are protected by other existing provisions in the title II regulation, including those requiring reasonable modifications of policies, practices, or procedures, and program accessibility.

**Web site accessibility.** Many commenters expressed disappointment that the NPRM did not require title II entities to make their Web sites, through which they offer programs and services, accessible to individuals with disabilities, including those who are blind or have low vision. Commenters argued that the cost of making Web sites accessible, through Web site design, is minimal, yet critical to enabling individuals with disabilities to benefit from the entity's programs and services. Internet Web sites, when accessible, provide individuals with disabilities great independence, and have become an essential tool for many Americans. Commenters recommended that the Department require covered entities, at a minimum, to meet the section 508 Standard for Electronic and Information Technology for Internet accessibility. Under section 508 of the Rehabilitation Act of 1973, Federal agencies are required to make their Web sites accessible. 29 U.S.C. 794(d); 36 CFR 1194.

The Department agrees that the ability to access, on an equal basis, the programs and activities offered by public entities through Internet-based Web sites is of great importance to individuals with disabilities, particularly those who are blind or who have low vision. When the ADA was enacted in 1990, the Internet was unknown to most Americans. Today, the Internet plays a critical role in daily life for personal, civic, commercial, and business purposes. In a period of shrinking resources, public entities increasingly rely on the web as an efficient and comprehensive way to deliver services and to inform and communicate with their citizens and the general public. In light of the growing importance Web sites play in providing access to public services and to disseminating the information citizens need to participate fully in civic life, accessing the Web sites of public entities can play a significant role in fulfilling the goals of the ADA.

Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title II covers Internet Web site access. Public entities that choose to provide services through web-based applications (e.g., renewing library books or driver's licenses) or that communicate with their constituents or provide information through the Internet must ensure that individuals with disabilities have equal access to such services or information, unless doing so would result in an undue financial and administrative burden or a fundamental alteration in the nature of the programs, services, or activities being offered. The Department has issued guidance on the ADA as applied to the Web sites of public entities in a 2003 publication entitled, *Accessibility of State and Local Government Web sites to People with Disabilities*, (June 2003) available at <http://www.ada.gov/websites2.htm>. As the Department stated in that publication, an agency with an inaccessible Web site may also meet its legal obligations by providing an alternative accessible way for citizens to use the programs or services, such as a staffed

telephone information line. However, such an alternative must provide an equal degree of access in terms of hours of operation and the range of options and programs available. For example, if job announcements and application forms are posted on an inaccessible Web site that is available 24 hours a day, seven days a week to individuals without disabilities, then the alternative accessible method must also be available 24 hours a day, 7 days a week. Additional guidance is available in the Web Content Accessibility Guidelines (WCAG), (May 5, 1999) available at <http://www.w3.org/TR/WAI-WEBCONTENT> (last visited June 24, 2010) which are developed and maintained by the Web Accessibility Initiative, a subgroup of the World Wide Web Consortium (W3C®).

The Department expects to engage in rulemaking relating to website accessibility under the ADA in the near future. The Department has enforced the ADA in the area of website accessibility on a case-by-case basis under existing rules consistent with the guidance noted above, and will continue to do so until the issue is addressed in a final regulation.

**Multiple chemical sensitivities.** The Department received comments from a number of individuals asking the Department to add specific language to the final rule addressing the needs of individuals with chemical sensitivities. These commenters expressed concern that the presence of chemicals interferes with their ability to participate in a wide range of activities. These commenters also urged the Department to add multiple chemical sensitivities to the definition of a disability.

The Department has determined not to include specific provisions addressing multiple chemical sensitivities in the final rule. In order to be viewed as a disability under the ADA, an impairment must substantially limit one or more major life activities. An individual's major life activities of respiratory or neurological functioning may be substantially limited by allergies or sensitivity to a degree that he or she is a person with a disability. When a person has this type of disability, a covered entity may have to make reasonable modifications in its policies and practices for that person. However, this determination is an individual assessment and must be made on a case-by-case basis.

**Examinations and Courses.** The Department received one comment requesting that it specifically include language regarding examinations and courses in the title II regulation. Because section 309 of the ADA 42 U.S.C. 12189, reaches "[a]ny person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post secondary education, professional, or trade purposes," public entities also are covered by this section of the ADA. Indeed, the requirements contained in title II (including the general prohibitions against discrimination, the program access requirements, the reasonable modifications requirements, and the communications requirements) apply to courses and examinations administered by public entities that meet the requirements of section 309. While the Department considers these requirements to be sufficient to ensure that examinations and courses administered by public entities meet the section 309 requirements, the Department acknowledges that the title III regulation, because it addresses examinations in some detail, is useful as a guide for determining what constitutes discriminatory conduct by a public entity in testing situations. See 28 CFR 36.309.

**Hotel Reservations.** In the NPRM, at § 36.302(e), the Department proposed adding specific language to title III addressing the requirements that hotels, timeshare resorts, and other places of lodging make reasonable modifications to their policies, practices, or procedures, when necessary to ensure that individuals with disabilities are able to reserve accessible hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms. The NPRM did not propose adding comparable language to the title II regulation as the Department believes that the general nondiscrimination, program access, effective communication, and reasonable modifications requirements of title II provide sufficient guidance to public entities that operate places of lodging (i.e., lodges in State

parks, hotels on public college campuses). The Department received no public comments suggesting that it add language on hotel reservations comparable to that proposed for the title III regulation. Although the Department continues to believe that it is unnecessary to add specific language to the title II regulation on this issue, the Department acknowledges that the title III regulation, because it addresses hotel reservations in some detail, is useful as a guide for determining what constitutes discriminatory conduct by a public entity that operates a reservation system serving a place of lodging. See 28 CFR 36.302(e).

[AG Order No. 3180-2010, 75 FR 56184, Sept. 15, 2010; 76 FR 13285, Mar. 11, 2011]

## **Appendix B to Part 35—Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services Originally Published July 26, 1991**

Note: For the convenience of the reader, this appendix contains the text of the preamble to the final regulation on nondiscrimination on the basis of disability in State and local government services beginning at the heading "Section-by-Section Analysis" and ending before "List of Subjects in 28 CFR Part 35" (56 FR 35696, July 26, 1991).

### **Section-by-Section Analysis**

#### **Subpart A—General**

##### **Section 35.101 Purpose**

Section 35.101 states the purpose of the rule, which is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (the Act), which prohibits discrimination on the basis of disability by public entities. This part does not, however, apply to matters within the scope of the authority of the Secretary of Transportation under subtitle B of title II of the Act.

##### **Section 35.102 Application**

This provision specifies that, except as provided in paragraph (b), the regulation applies to all services, programs, and activities provided or made available by public entities, as that term is defined in § 35.104. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), which prohibits discrimination on the basis of handicap in federally assisted programs and activities, already covers those programs and activities of public entities that receive Federal financial assistance. Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance. Except as provided in § 35.104, this part does not apply to private entities.

The scope of title II's coverage of public entities is comparable to the coverage of Federal Executive agencies under the 1978 amendment to section 504, which extended section 504's application to all programs and activities "conducted by" Federal Executive agencies, in that title II applies to anything a public entity does. Title II coverage, however, is not limited to "Executive" agencies, but includes activities of the legislative and judicial branches of State and local governments. All governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements. The private entity operating the inn would also be subject to the obligations of public accommodations under title III of the Act and the Department's title III regulations at 28 CFR part 36.

Aside from employment, which is also covered by title I of the Act, there are two major categories of programs or activities covered by this regulation: those involving general public contact as part of ongoing operations of the entity and those directly administered by the entities for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the entity's facilities. Activities in the second category include programs that provide State or local government services or benefits.

Paragraph (b) of § 35.102 explains that to the extent that the public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the Act, they are subject to the regulation of the Department of Transportation (DOT) at 49 CFR part 37, and are not covered by this part. The Department of Transportation's ADA regulation establishes specific requirements for construction of transportation facilities and acquisition of vehicles. Matters not covered by subtitle B, such as the provision of auxiliary aids, are covered by this rule. For example, activities that are covered by the Department of Transportation's regulation implementing subtitle B are not required to be included in the self-evaluation required by § 35.105. In addition, activities not specifically addressed by DOT's ADA regulation may be covered by DOT's regulation implementing section 504 for its federally assisted programs and activities at 49 CFR part 27. Like other programs of public entities that are also recipients of Federal financial assistance, those programs would be covered by both the section 504 regulation and this part. Although airports operated by public entities are not subject to DOT's ADA regulation, they are subject to subpart A of title II and to this rule.

Some commenters asked for clarification about the responsibilities of public school systems under section 504 and the ADA with respect to programs, services, and activities that are not covered by the Individuals with Disabilities Education Act (IDEA), including, for example, programs open to parents or to the public, graduation ceremonies, parent-teacher organization meetings, plays and other events open to the public, and adult education classes. Public school systems must comply with the ADA in all of their services, programs, or activities, including those that are open to parents or to the public. For instance, public school systems must provide program accessibility to parents and guardians with disabilities to these programs, activities, or services, and appropriate auxiliary aids and services whenever necessary to ensure effective communication, as long as the provision of the auxiliary aids results neither in an undue burden or in a fundamental alteration of the program.

## Section 35.103 Relationship to Other Laws

Section 35.103 is derived from sections 501 (a) and (b) of the ADA. Paragraph (a) of this section provides that, except as otherwise specifically provided by this part, title II of the ADA is not intended to apply lesser standards than are required under title V of the Rehabilitation Act of 1973, as amended (29 U.S.C. 790-94), or the regulations implementing that title. The standards of title V of the Rehabilitation Act apply for purposes of the ADA to the extent that the ADA has not explicitly adopted a different standard than title V. Because title II of the ADA essentially

extends the antidiscrimination prohibition embodied in section 504 to all actions of State and local governments, the standards adopted in this part are generally the same as those required under section 504 for federally assisted programs. Title II, however, also incorporates those provisions of titles I and III of the ADA that are not inconsistent with the regulations implementing section 504. Judiciary Committee report, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 51 (1990) (hereinafter "Judiciary report"); Education and Labor Committee report, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 84 (1990) (hereinafter "Education and Labor report"). Therefore, this part also includes appropriate provisions derived from the regulations implementing those titles. The inclusion of specific language in this part, however, should not be interpreted as an indication that a requirement is not included under a regulation implementing section 504.

Paragraph (b) makes clear that Congress did not intend to displace any of the rights or remedies provided by other Federal laws (including section 504) or other State laws (including State common law) that provide greater or equal protection to individuals with disabilities. As discussed above, the standards adopted by title II of the ADA for State and local government services are generally the same as those required under section 504 for federally assisted programs and activities. Subpart F of the regulation establishes compliance procedures for processing complaints covered by both this part and section 504.

With respect to State law, a plaintiff may choose to pursue claims under a State law that does not confer greater substantive rights, or even confers fewer substantive rights, if the alleged violation is protected under the alternative law and the remedies are greater. For example, a person with a physical disability could seek damages under a State law that allows compensatory and punitive damages for discrimination on the basis of physical disability, but not on the basis of mental disability. In that situation, the State law would provide narrower coverage, by excluding mental disabilities, but broader remedies, and an individual covered by both laws could choose to bring an action under both laws. Moreover, State tort claims confer greater remedies and are not preempted by the ADA. A plaintiff may join a State tort claim to a case brought under the ADA. In such a case, the plaintiff must, of course, prove all the elements of the State tort claim in order to prevail under that cause of action.

## Section 35.104 Definitions

**"Act."** The word "Act" is used in this part to refer to the Americans with Disabilities Act of 1990, Public Law 101-336, which is also referred to as the "ADA."

**"Assistant Attorney General."** The term "Assistant Attorney General" refers to the Assistant Attorney General of the Civil Rights Division of the Department of Justice.

**"Auxiliary aids and services."** Auxiliary aids and services include a wide range of services and devices for ensuring effective communication. The proposed definition in § 35.104 provided a list of examples of auxiliary aids and services that were taken from the definition of auxiliary aids and services in section 3(1) of the ADA and were supplemented by examples from regulations implementing section 504 in federally conducted programs (see 28 CFR 39.103).

A substantial number of commenters suggested that additional examples be added to this list. The Department has added several items to this list but wishes to clarify that the list is not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. It is not possible to provide an exhaustive list, and an attempt to do so would omit the new devices that will become available with emerging technology.

Subparagraph (1) lists several examples, which would be considered auxiliary aids and services to make aurally delivered materials available to individuals with hearing impairments. The Department has changed the phrase used in the proposed rules, "orally delivered materials," to the statutory phrase, "aurally delivered materials," to track section 3 of the ADA and to include non-verbal sounds and alarms, and computer generated speech.

The Department has added videotext displays, transcription services, and closed and open captioning to the list of examples. Videotext displays have become an important means of accessing auditory communications through a public address system. Transcription services are used to relay aurally delivered material almost simultaneously in written form to persons who are deaf or hearing-impaired. This technology is often used at conferences, conventions, and hearings. While the proposed rule expressly included television decoder equipment as an auxiliary aid or service, it did not mention captioning itself. The final rule rectifies this omission by mentioning both closed and open captioning.

Several persons and organizations requested that the Department replace the term "telecommunications devices for deaf persons" or "TDD's" with the term "text telephone." The Department has declined to do so. The Department is aware that the Architectural and Transportation Barriers Compliance Board (ATBCB) has used the phrase "text telephone" in lieu of the statutory term "TDD" in its final accessibility guidelines. Title IV of the ADA, however, uses the term "Telecommunications Device for the Deaf" and the Department believes it would be inappropriate to abandon this statutory term at this time.

Several commenters urged the Department to include in the definition of "auxiliary aids and services" devices that are now available or that may become available with emerging technology. The Department declines to do so in the rule. The Department, however, emphasizes that, although the definition would include "state of the art" devices, public entities are not required to use the newest or most advanced technologies as long as the auxiliary aid or service that is selected affords effective communication.

Subparagraph (2) lists examples of aids and services for making visually delivered materials accessible to persons with visual impairments. Many commenters proposed additional examples, such as signage or mapping, audio description services, secondary auditory programs, telebraillers, and reading machines. While the Department declines to add these items to the list, they are auxiliary aids and services and may be appropriate depending on the circumstances.

Subparagraph (3) refers to acquisition or modification of equipment or devices. Several commenters suggested the addition of current technological innovations in microelectronics and computerized control systems (e.g., voice recognition systems, automatic dialing telephones, and infrared elevator and light control systems) to the list of auxiliary aids. The Department interprets auxiliary aids and services as those aids and services designed to provide effective communications, i.e., making aurally and visually delivered information available to persons with hearing, speech, and vision impairments. Methods of making services, programs, or activities accessible to, or usable by, individuals with mobility or manual dexterity impairments are addressed by other sections of this part, including the provision for modifications in policies, practices, or procedures (§ 35.130 (b)(7)).

Paragraph (b)(4) deals with other similar services and actions. Several commenters asked for clarification that "similar services and actions" include retrieving items from shelves, assistance in reaching a marginally accessible seat, pushing a barrier aside in order to provide an accessible route, or assistance in removing a sweater or coat. While retrieving an item from a shelf might be an "auxiliary aid or service" for a blind person who could not locate the item without assistance, it might be a method of providing program access for a person using a wheelchair who could not reach the shelf, or a reasonable modification to a self-service policy for an individual who lacked the ability to grasp the item. As explained

above, auxiliary aids and services are those aids and services required to provide effective communications. Other forms of assistance are more appropriately addressed by other provisions of the final rule.

**"Complete complaint."** "Complete complaint" is defined to include all the information necessary to enable the Federal agency designated under subpart G as responsible for investigation of a complaint to initiate its investigation.

**"Current illegal use of drugs."** The phrase "current illegal use of drugs" is used in § 35.131. Its meaning is discussed in the preamble for that section.

**"Designated agency."** The term "designated agency" is used to refer to the Federal agency designated under subpart G of this rule as responsible for carrying out the administrative enforcement responsibilities established by subpart F of the rule.

**"Disability."** The definition of the term "disability" is the same as the definition in the title III regulation codified at 28 CFR part 36. It is comparable to the definition of the term "individual with handicaps" in section 7(8) of the Rehabilitation Act and section 802(h) of the Fair Housing Act. The Education and Labor Committee report makes clear that the analysis of the term "individual with handicaps" by the Department of Health, Education, and Welfare (HEW) in its regulations implementing section 504 (42 FR 22685 (May 4, 1977)) and the analysis by the Department of Housing and Urban Development in its regulation implementing the Fair Housing Amendments Act of 1988 (54 FR 3232 (Jan. 23, 1989)) should also apply fully to the term "disability" (Education and Labor report at 50).

The use of the term "disability" instead of "handicap" and the term "individual with a disability" instead of "individual with handicaps" represents an effort by Congress to make use of up-to-date, currently accepted terminology. As with racial and ethnic epithets, the choice of terms to apply to a person with a disability is overlaid with stereotypes, patronizing attitudes, and other emotional connotations. Many individuals with disabilities, and organizations representing such individuals, object to the use of such terms as "handicapped person" or "the handicapped." In other recent legislation, Congress also recognized this shift in terminology, e.g., by changing the name of the National Council on the Handicapped to the National Council on Disability (Pub. L. 100-630).

In enacting the Americans with Disabilities Act, Congress concluded that it was important for the current legislation to use terminology most in line with the sensibilities of most Americans with disabilities. No change in definition or substance is intended nor should one be attributed to this change in phraseology.

The term "disability" means, with respect to an individual—

- (A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) A record of such an impairment; or
- (C) Being regarded as having such an impairment. If an individual meets any one of these three tests, he or she is considered to be an individual with a disability for purposes of coverage under the Americans with Disabilities Act.

Congress adopted this same basic definition of "disability," first used in the Rehabilitation Act of 1973 and in the Fair Housing Amendments Act of 1988, for a number of reasons. First, it has worked well since it was adopted in 1974. Second, it would not be possible to guarantee comprehensiveness by providing a list of specific disabilities, especially because new disorders may be recognized in the future, as they have since the definition was first established in 1974.

## Test A—A physical or mental impairment that substantially limits one or more of the major life activities of such individual

*Physical or mental impairment.* Under the first test, an individual must have a physical or mental impairment. As explained in paragraph (1)(i) of the definition, "impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs (which would include speech organs that are not respiratory such as vocal cords, soft palate, tongue, etc.); respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. This list closely tracks the one used in the regulations for section 504 of the Rehabilitation Act of 1973 (see, e.g., 45 CFR 84.3(j)(2)(i)).

Many commenters asked that "traumatic brain injury" be added to the list in paragraph (1)(i). Traumatic brain injury is already included because it is a physiological condition affecting one of the listed body systems, i.e., "neurological." Therefore, it was unnecessary to add the term to the regulation, which only provides representative examples of physiological disorders.

It is not possible to include a list of all the specific conditions, contagious and noncontagious diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that other conditions or disorders may be identified in the future. However, the list of examples in paragraph (1)(ii) of the definition includes: orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism. The phrase "symptomatic or asymptomatic" was inserted in the final rule after "HIV disease" in response to commenters who suggested the clarification was necessary.

The examples of "physical or mental impairments" in paragraph (1)(ii) are the same as those contained in many section 504 regulations, except for the addition of the phrase "contagious and noncontagious" to describe the types of diseases and conditions included, and the addition of "HIV disease (symptomatic or asymptomatic)" and "tuberculosis" to the list of examples. These additions are based on the committee reports, caselaw, and official legal opinions interpreting section 504. In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), a case involving an individual with tuberculosis, the Supreme Court held that people with contagious diseases are entitled to the protections afforded by section 504. Following the *Arline* decision, this Department's Office of Legal Counsel issued a legal opinion that concluded that symptomatic HIV disease is an impairment that substantially limits a major life activity; therefore it has been included in the definition of disability under this part. The opinion also concluded that asymptomatic HIV disease is an impairment that substantially limits a major life activity, either because of its actual effect on the individual with HIV disease or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as though they are disabled. See Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), reprinted in Hearings on S. 933, the Americans with Disabilities Act, Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st. Cong., 1st Sess. 346 (1989).

Paragraph (1)(iii) states that the phrase "physical or mental impairment" does not include homosexuality or bisexuality. These conditions were never considered impairments under other Federal disability laws. Section 511(a) of the statute makes clear that they are likewise not to be considered impairments under the Americans with Disabilities Act.

Physical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural, economic, or other disadvantages, such as having a prison record, or being poor. Nor is age a disability. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. However, a person who has these characteristics and also has a physical or mental impairment may be considered as having a disability for purposes of the Americans with Disabilities Act based on the impairment.

*Substantial Limitation of a Major Life Activity.* Under Test A, the impairment must be one that “substantially limits a major life activity.” Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

For example, a person who is paraplegic is substantially limited in the major life activity of walking, a person who is blind is substantially limited in the major life activity of seeing, and a person who is mentally retarded is substantially limited in the major life activity of learning. A person with traumatic brain injury is substantially limited in the major life activities of caring for one's self, learning, and working because of memory deficit, confusion, contextual difficulties, and inability to reason appropriately.

A person is considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person with a minor, trivial impairment, such as a simple infected finger, is not impaired in a major life activity. A person who can walk for 10 miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

The Department received many comments on the proposed rule's inclusion of the word “temporary” in the definition of “disability.” The preamble indicated that impairments are not necessarily excluded from the definition of “disability” simply because they are temporary, but that the duration, or expected duration, of an impairment is one factor that may properly be considered in determining whether the impairment substantially limits a major life activity. The preamble recognized, however, that temporary impairments, such as a broken leg, are not commonly regarded as disabilities, and only in rare circumstances would the degree of the limitation and its expected duration be substantial. Nevertheless, many commenters objected to inclusion of the word “temporary” both because it is not in the statute and because it is not contained in the definition of “disability” set forth in the title I regulations of the Equal Employment Opportunity Commission (EEOC). The word “temporary” has been deleted from the final rule to conform with the statutory language.

The question of whether a temporary impairment is a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services. For example, a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

Many commenters asked that environmental illness (also known as multiple chemical sensitivity) as well as allergy to cigarette smoke be recognized as disabilities. The Department, however, declines to state categorically that these types of allergies or sensitivities are disabilities, because the determination as to whether an impairment is a disability depends on whether, given the particular circumstances at issue, the impairment substantially limits one or more major life activities (or has a history of, or is regarded as having such an effect).

Sometimes respiratory or neurological functioning is so severely affected that an individual will satisfy the requirements to be considered disabled under the regulation. Such an individual would be entitled to all of the protections afforded by the Act and this part. In other cases, individuals may be sensitive to environmental elements or to smoke but their sensitivity will not rise to the level needed to constitute a disability. For example, their major life activity of breathing may be somewhat, but not substantially, impaired. In such circumstances, the individuals are not disabled and are not entitled to the protections of the statute despite their sensitivity to environmental agents.

In sum, the determination as to whether allergies to cigarette smoke, or allergies or sensitivities characterized by the commenters as environmental illness are disabilities covered by the regulation must be made using the same case-by-case analysis that is applied to all other physical or mental impairments. Moreover, the addition of specific regulatory provisions relating to environmental illness in the final rule would be inappropriate at this time pending future consideration of the issue by the Architectural and Transportation Barriers Compliance Board, the Environmental Protection Agency, and the Occupational Safety and Health Administration of the Department of Labor.

## Test B—A record of such an impairment

This test is intended to cover those who have a record of an impairment. As explained in paragraph (3) of the rule's definition of disability, this includes a person who has a history of an impairment that substantially limited a major life activity, such as someone who has recovered from an impairment. It also includes persons who have been misclassified as having an impairment.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited. Frequently occurring examples of the first group (those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (those who have been misclassified as having an impairment) are persons who have been misclassified as having mental retardation or mental illness.

## Test C—Being regarded as having such an impairment

This test, as contained in paragraph (4) of the definition, is intended to cover persons who are treated by a public entity as having a physical or mental impairment that substantially limits a major life activity. It applies when a person is treated as if he or she has an impairment that substantially limits a major life activity, regardless of whether that person has an impairment.

The Americans with Disabilities Act uses the same "regarded as" test set forth in the regulations implementing section 504 of the Rehabilitation Act. See, e.g., 28 CFR 42.540(k)(2)(iv), which provides:

(iv) "Is regarded as having an impairment" means (A) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) Has none of the impairments defined in paragraph (k)(2)(i) of this section but is treated by a recipient as having such an impairment.

The perception of the covered entity is a key element of this test. A person who perceives himself or herself to have an impairment, but does not have an impairment, and is not treated as if he or she has an impairment, is not protected under this test.

A person would be covered under this test if a public entity refused to serve the person because it perceived that the person had an impairment that limited his or her enjoyment of the goods or services being offered.

For example, persons with severe burns often encounter discrimination in community activities, resulting in substantial limitation of major life activities. These persons would be covered under this test based on the attitudes of others towards the impairment, even if they did not view themselves as "impaired."

The rationale for this third test, as used in the Rehabilitation Act of 1973, was articulated by the Supreme Court in *Arline*, 480 U.S. 273 (1987). The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." *Id.* at 283. The Court concluded that, by including this test in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." *Id.* at 284.

Thus, a person who is denied services or benefits by a public entity because of myths, fears, and stereotypes associated with disabilities would be covered under this third test whether or not the person's physical or mental condition would be considered a disability under the first or second test in the definition.

If a person is refused admittance on the basis of an actual or perceived physical or mental condition, and the public entity can articulate no legitimate reason for the refusal (such as failure to meet eligibility criteria), a perceived concern about admitting persons with disabilities could be inferred and the individual would qualify for coverage under the "regarded as" test. A person who is covered because of being regarded as having an impairment is not required to show that the public entity's perception is inaccurate (e.g., that he will be accepted by others) in order to receive benefits from the public entity.

Paragraph (5) of the definition lists certain conditions that are not included within the definition of "disability." The excluded conditions are: Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. Unlike homosexuality and bisexuality, which are not considered impairments under either section 504 or the Americans with Disabilities Act (see the definition of "disability," paragraph (1)(iv)), the conditions listed in paragraph (5), except for transvestism, are not necessarily excluded as impairments under section 504. (Transvestism was excluded from the definition of disability for section 504 by the Fair Housing Amendments Act of 1988, Pub. L. 100-430, section 6(b)).

**"Drug."** The definition of the term "drug" is taken from section 510(d)(2) of the ADA.

**"Facility."** "Facility" means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. It includes both indoor and outdoor areas where human-constructed improvements, structures, equipment, or property have been added to the natural environment.

Commenters raised questions about the applicability of this part to activities operated in mobile facilities, such as bookmobiles or mobile health screening units. Such activities would be covered by the requirement for program accessibility in § 35.150, and would be included in the definition of "facility" as "other real or personal property," although standards for new construction and alterations of such facilities are not yet included in the accessibility standards adopted by § 35.151. Sections 35.150 and 35.151 specifically address the obligations of public entities to ensure accessibility by providing curb ramps at pedestrian walkways.

**"Historic preservation programs"** and **"Historic properties"** are defined in order to aid in the interpretation of §§ 35.150 (a)(2) and

(b) (2), which relate to accessibility of historic preservation programs, and § 35.151(d), which relates to the alteration of historic properties.

**"Illegal use of drugs."** The definition of "illegal use of drugs" is taken from section 510(d)(1) of the Act and clarifies that the term includes the illegal use of one or more drugs.

**"Individual with a disability"** means a person who has a disability but does not include an individual who is currently illegally using drugs, when the public entity acts on the basis of such use. The phrase "current illegal use of drugs" is explained in § 35.131.

**"Public entity."** The term "public entity" is defined in accordance with section 201(1) of the ADA as any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; or the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

**"Qualified individual with a disability."** The definition of "qualified individual with a disability" is taken from section 201(2) of the Act, which is derived from the definition of "qualified handicapped person" in the Department of Health and Human Services' regulation implementing section 504 (45 CFR § 84.3(k)). It combines the definition at 45 CFR 84.3(k)(1) for employment ("a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question") with the definition for other services at 45 CFR 84.3(k)(4) ("a handicapped person who meets the essential eligibility requirements for the receipt of such services").

Some commenters requested clarification of the term "essential eligibility requirements." Because of the variety of situations in which an individual's qualifications will be at issue, it is not possible to include more specific criteria in the definition. The "essential eligibility requirements" for participation in some activities covered under this part may be minimal. For example, most public entities provide information about their operations as a public service to anyone who requests it. In such situations, the only "eligibility requirement" for receipt of such information would be the request for it. Where such information is provided by telephone, even the ability to use a voice telephone is not an "essential eligibility requirement," because § 35.161 requires a public entity to provide equally effective telecommunication systems for individuals with impaired hearing or speech.

For other activities, identification of the "essential eligibility requirements" may be more complex. Where questions of safety are involved, the principles established in § 36.208 of the Department's regulation implementing title III of the ADA, to be codified at 28 CFR, part 36, will be applicable. That section implements section 302(b)(3) of the Act, which provides that a public accommodation is not required to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation, if that individual poses a direct threat to the health or safety of others.

A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the Supreme Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety. Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be "qualified," if reasonable modifications to the public entity's policies, practices, or procedures will not eliminate that risk.

The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. This is the test established by the Supreme Court in *Arline*. Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health.

**"Qualified interpreter."** The Department received substantial comment regarding the lack of a definition of "qualified interpreter." The proposed rule defined auxiliary aids and services to include the statutory term, "qualified interpreters" (§ 35.104), but did not define it. Section 35.160 requires the use of auxiliary aids including qualified interpreters and commenters stated that a lack of guidance on what the term means would create confusion among those trying to secure interpreting services and often result in less than effective communication.

Many commenters were concerned that, without clear guidance on the issue of "qualified" interpreter, the rule would be interpreted to mean "available, rather than qualified" interpreters. Some claimed that few public entities would understand the difference between a qualified interpreter and a person who simply knows a few signs or how to fingerspell.

In order to clarify what is meant by "qualified interpreter" the Department has added a definition of the term to the final rule. A qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary. This definition focuses on the actual ability of the interpreter in a particular interpreting context to facilitate effective communication between the public entity and the individual with disabilities.

Public comment also revealed that public entities have at times asked persons who are deaf to provide family members or friends to interpret. In certain circumstances, notwithstanding that the family member or friend is able to interpret or is a certified interpreter, the family member or friend may not be qualified to

render the necessary interpretation because of factors such as emotional or personal involvement or considerations of confidentiality that may adversely affect the ability to interpret "effectively, accurately, and impartially."

The definition of "qualified interpreter" in this rule does not invalidate or limit standards for interpreting services of any State or local law that are equal to or more stringent than those imposed by this definition. For instance, the definition would not supersede any requirement of State law for use of a certified interpreter in court proceedings.

**"Section 504."** The Department added a definition of "section 504" because the term is used extensively in subpart F of this part.

**"State."** The definition of "State" is identical to the statutory definition in section 3(3) of the ADA.

## Section 35.105 Self-evaluation

Section 35.105 establishes a requirement, based on the section 504 regulations for federally assisted and federally conducted programs, that a public entity evaluate its current policies and practices to identify and correct any that are not consistent with the requirements of this part. As noted in the discussion of § 35.102, activities covered by the Department of Transportation's regulation implementing subtitle B of title II are not required to be included in the self-evaluation required by this section.

Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with disabilities, which has promoted both effective and efficient implementation of section 504. The Department expects that it will likewise be useful to public entities newly covered by the ADA.

All public entities are required to do a self-evaluation. However, only those that employ 50 or more persons are required to maintain the self-evaluation on file and make it available for public inspection for three years. The number 50 was derived from the Department of Justice's section 504 regulations for federally assisted programs, 28 CFR 42.505(c). The Department received comments critical of this limitation, some suggesting the requirement apply to all public entities and others suggesting that the number be changed from 50 to 15. The final rule has not been changed. Although many regulations implementing section 504 for federally assisted programs do use 15 employees as the cut-off for this record-keeping requirement, the Department believes that it would be inappropriate to extend it to those smaller public entities covered by this regulation that do not receive Federal financial assistance. This approach has the benefit of minimizing paperwork burdens on small entities.

Paragraph (d) provides that the self-evaluation required by this section shall apply only to programs not subject to section 504 or those policies and practices, such as those involving communications access, that have not already been included in a self-evaluation required under an existing regulation implementing section 504. Because most self-evaluations were done from five to twelve years ago, however, the Department expects that a great many public entities will be reexamining all of their policies and programs. Programs and functions may have changed, and actions that were supposed to have been taken to comply with section 504 may not have been fully implemented or may no longer be effective. In addition, there have been statutory amendments to section 504 which have changed the coverage of section 504, particularly the Civil Rights Restoration Act of 1987, Public Law No. 100-259, 102 Stat. 28 (1988), which broadened the definition of a covered "program or activity."

Several commenters suggested that the Department clarify public entities' liability during the one-year period for compliance with the self-evaluation requirement. The self-evaluation requirement does not stay the effective date of the statute nor of this part. Public entities are, therefore, not shielded from discrimination claims during that time.

Other commenters suggested that the rule require that every self-evaluation include an examination of training efforts to assure that individuals with disabilities are not subjected to discrimination because of insensitivity, particularly in the law enforcement area. Although the Department has not added such a specific requirement to the rule, it would be appropriate for public entities to evaluate training efforts because, in many cases, lack of training leads to discriminatory practices, even when the policies in place are nondiscriminatory.

## Section 35.106 Notice

Section 35.106 requires a public entity to disseminate sufficient information to applicants, participants, beneficiaries, and other interested persons to inform them of the rights and protections afforded by the ADA and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe a public entity's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio. In providing the notice, a public entity must comply with the requirements for effective communication in § 35.160. The preamble to that section gives guidance on how to effectively communicate with individuals with disabilities.

## Section 35.107 Designation of Responsible Employee and Adoption of Grievance Procedures

Consistent with § 35.105, self-evaluation, the final rule requires that public entities with 50 or more employees designate a responsible employee and adopt grievance procedures. Most of the commenters who suggested that the requirement that self-evaluation be maintained on file for three years not be limited to those employing 50 or more persons made a similar suggestion concerning § 35.107. Commenters recommended either that all public entities be subject to § 35.107, or that "50 or more persons" be changed to "15 or more persons." As explained in the discussion of § 35.105, the Department has not adopted this suggestion.

The requirement for designation of an employee responsible for coordination of efforts to carry out responsibilities under this part is derived from the HEW regulation implementing section 504 in federally assisted programs. The requirement for designation of a particular employee and dissemination of information about how to locate that employee helps to ensure that individuals dealing with large agencies are able to easily find a responsible person who is familiar with the requirements of the Act and this part and can communicate those requirements to other individuals in the agency who may be unaware of their responsibilities. This paragraph in no way limits a public entity's obligation to ensure that all of its employees comply with the requirements of this part, but it ensures that any failure by individual employees can be promptly corrected by the designated employee.

Section 35.107(b) requires public entities with 50 or more employees to establish grievance procedures for resolving complaints of violations of this part. Similar requirements are found in the section 504 regulations for federally assisted programs (see, e.g., 45 CFR 84.7(b)). The rule, like the regulations for

federally assisted programs, provides for investigation and resolution of complaints by a Federal enforcement agency. It is the view of the Department that public entities subject to this part should be required to establish a mechanism for resolution of complaints at the local level without requiring the complainant to resort to the Federal complaint procedures established under subpart F. Complainants would not, however, be required to exhaust the public entity's grievance procedures before filing a complaint under subpart F. Delay in filing the complaint at the Federal level caused by pursuit of the remedies available under the grievance procedure would generally be considered good cause for extending the time allowed for filing under § 35.170(b).

## Subpart B—General Requirements

### Section 35.130 General Prohibitions Against Discrimination

The general prohibitions against discrimination in the rule are generally based on the prohibitions in existing regulations implementing section 504 and, therefore, are already familiar to State and local entities covered by section 504. In addition, § 35.130 includes a number of provisions derived from title III of the Act that are implicit to a certain degree in the requirements of regulations implementing section 504.

Several commenters suggested that this part should include the section of the proposed title III regulation that implemented section 309 of the Act, which requires that courses and examinations related to applications, licensing, certification, or credentialing be provided in an accessible place and manner or that alternative accessible arrangements be made. The Department has not adopted this suggestion. The requirements of this part, including the general prohibitions of discrimination in this section, the program access requirements of subpart D, and the communications requirements of subpart E, apply to courses and examinations provided by public entities. The Department considers these requirements to be sufficient to ensure that courses and examinations administered by public entities meet the requirements of section 309. For example, a public entity offering an examination must ensure that modifications of policies, practices, or procedures or the provision of auxiliary aids and services furnish the individual with a disability an equal opportunity to demonstrate his or her knowledge or ability. Also, any examination specially designed for individuals with disabilities must be offered as often and in as timely a manner as are other examinations. Further, under this part, courses and examinations must be offered in the most integrated setting appropriate. The analysis of § 35.130(d) is relevant to this determination.

A number of commenters asked that the regulation be amended to require training of law enforcement personnel to recognize the difference between criminal activity and the effects of seizures or other disabilities such as mental retardation, cerebral palsy, traumatic brain injury, mental illness, or deafness. Several disabled commenters gave personal statements about the abuse they had received at the hands of law enforcement personnel. Two organizations that commented cited the Judiciary report at 50 as authority to require law enforcement training.

The Department has not added such a training requirement to the regulation. Discriminatory arrests and brutal treatment are already unlawful police activities. The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities. Under this section law enforcement personnel would be required to make appropriate efforts to determine whether perceived strange or disruptive behavior or unconsciousness is the result of a disability. The Department notes that a number

of States have attempted to address the problem of arresting disabled persons for noncriminal conduct resulting from their disability through adoption of the Uniform Duties to Disabled Persons Act, and encourages other jurisdictions to consider that approach.

Paragraph (a) restates the nondiscrimination mandate of section 202 of the ADA. The remaining paragraphs in § 35.130 establish the general principles for analyzing whether any particular action of the public entity violates this mandate.

Paragraph (b) prohibits overt denials of equal treatment of individuals with disabilities. A public entity may not refuse to provide an individual with a disability with an equal opportunity to participate in or benefit from its program simply because the person has a disability.

Paragraph (b)(1)(i) provides that it is discriminatory to deny a person with a disability the right to participate in or benefit from the aid, benefit, or service provided by a public entity. Paragraph (b)(1)(ii) provides that the aids, benefits, and services provided to persons with disabilities must be equal to those provided to others, and paragraph (b)(1)(iii) requires that the aids, benefits, or services provided to individuals with disabilities must be as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as those provided to others. These paragraphs are taken from the regulations implementing section 504 and simply restate principles long established under section 504.

Paragraph (b)(1)(iv) permits the public entity to develop separate or different aids, benefits, or services when necessary to provide individuals with disabilities with an equal opportunity to participate in or benefit from the public entity's programs or activities, but only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Paragraph (b)(1)(iv) must be read in conjunction with paragraphs (b)(2), (d), and (e). Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with a disability still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities. Paragraph (d) requires that a public entity administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

Paragraph (b)(2) specifies that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Paragraph (e), which is derived from section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.

Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status. For example, it would be a violation of this provision to require persons with disabilities to eat in the back room of a government cafeteria or to refuse to allow a person with a disability the full use of recreation or exercise facilities because of stereotypes about the person's ability to participate.

Many commenters objected to proposed paragraphs (b)(1)(iv) and (d) as allowing continued segregation of individuals with disabilities. The Department recognizes that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and agrees that, in most instances, separate programs for individuals with disabilities will not be permitted. Nevertheless, section 504 does permit separate programs in limited circumstances, and Congress clearly intended the regulations issued under title II to adopt the standards of section 504. Furthermore, Congress included authority for separate programs in the specific requirements of title III of the Act. Section 302(b)(1)(A)(iii) of the Act provides for separate benefits in language similar to that in § 35.130(b)(1)(iv), and section 302(b)(1)(B) includes the same requirement for "the most integrated setting appropriate" as in § 35.130(d).

Even when separate programs are permitted, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.

For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

In addition, it would not be a violation of this section for a public entity to offer recreational programs specially designed for children with mobility impairments. However, it would be a violation of this section if the entity then excluded these children from other recreational services for which they are qualified to participate when these services are made available to nondisabled children, or if the entity required children with disabilities to attend only designated programs.

Many commenters asked that the Department clarify a public entity's obligations within the integrated program when it offers a separate program but an individual with a disability chooses not to participate in the separate program. It is impossible to make a blanket statement as to what level of auxiliary aids or modifications would be required in the integrated program. Rather, each situation must be assessed individually. The starting point is to question whether the separate program is in fact necessary or appropriate for the individual. Assuming the separate program would be appropriate for a particular individual, the extent to which that individual must be provided with modifications in the integrated program will depend not only on what the individual needs but also on the limitations and defenses of this part. For example, it may constitute an undue burden for a public accommodation, which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program. The Department cannot identify categorically the level of assistance or aid required in the integrated program.

Paragraph (b)(1)(v) provides that a public entity may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program. This paragraph is taken from the regulations implementing section 504 for federally assisted programs.

Paragraph (b)(1)(vi) prohibits the public entity from denying a qualified individual with a disability the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vii) prohibits the public entity from limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the public entity from utilizing criteria or methods of administration that deny individuals with disabilities access to the public entity's services, programs, and activities or that perpetuate the discrimination of another public entity, if both public entities are subject to common administrative control or are agencies of the same State. The phrase "criteria or methods of administration" refers to official written policies of the public entity and to the actual practices of the public entity. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in *Alexander v. Choate*, 469 U.S. 287 (1985). The Court in *Choate* explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: "These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design." *Id.* at 297 (footnote omitted).

Paragraph (b)(4) specifically applies the prohibition enunciated in § 35.130(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the public entity. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the public entity, in the selection of procurement contractors, from using criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

Paragraph (b)(6) prohibits the public entity from discriminating against qualified individuals with disabilities on the basis of disability in the granting of licenses or certification. A person is a "qualified individual with a disability" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification (see § 35.104).

A number of commenters were troubled by the phrase "essential eligibility requirements" as applied to State licensing requirements, especially those for health care professions. Because of the variety of types of programs to which the definition of "qualified individual with a disability" applies, it is not possible to use more specific language in the definition. The phrase "essential eligibility requirements," however, is taken from the definitions in the regulations implementing section 504, so caselaw under section 504 will be applicable to its interpretation. In *Southeastern Community College v. Davis*, 442 U.S. 397, for example, the Supreme Court held that section 504 does not require an institution to "lower or effect substantial modifications of standards to accommodate a handicapped person," 442 U.S. at 413, and that the school had established that the plaintiff was not "qualified" because she was not able to "serve the nursing profession in all customary ways," *id.* Whether a particular requirement is "essential" will, of course, depend on the facts of the particular case.

In addition, the public entity may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. For example, the public entity must comply with this requirement when establishing safety standards for the operations of licensees. In that case the public entity must ensure that standards that it promulgates do not discriminate against the employment of qualified individuals with disabilities in an impermissible manner.

Paragraph (b)(6) does not extend the requirements of the Act or this part directly to the programs or activities of licensees or certified entities themselves. The programs or activities of licensees or certified entities are not themselves programs or activities of the public entity merely by virtue of the license or certificate.

Paragraph (b)(7) is a specific application of the requirement under the general prohibitions of discrimination that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability. Section 302(b)(2)(A)(ii) of the ADA sets out this requirement specifically for public accommodations covered by title III of the Act, and the House Judiciary Committee Report directs the Attorney General to include those specific requirements in the title II regulation to the extent that they do not conflict with the regulations implementing section 504. Judiciary report at 52.

Paragraph (b)(8), a new paragraph not contained in the proposed rule, prohibits the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. This prohibition is also a specific application of the general prohibitions of discrimination and is based on section 302(b)(2)(A)(i) of the ADA. It prohibits overt denials of equal treatment of individuals with disabilities, or establishment of exclusive or segregative criteria that would bar individuals with disabilities from participation in services, benefits, or activities.

Paragraph (b)(8) also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public entities may not require that a qualified individual with a disability be accompanied by an attendant. A public entity is not, however, required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution.

In addition, paragraph (b)(8) prohibits the imposition of criteria that "tend to" screen out an individual with a disability. This concept, which is derived from current regulations under section 504 (see, e.g., 45 CFR 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, indirectly prevent or limit their ability to participate. For example, requiring presentation of a driver's license as the sole means of identification for purposes of paying by check would violate this section in situations where, for example, individuals with severe vision impairments or developmental disabilities or epilepsy are ineligible to receive a driver's license and the use of an alternative means of identification, such as another photo I.D. or credit card, is feasible.

A public entity may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the safe operation of the program in question. Examples of safety qualifications that would be justifiable in appropriate circumstances would include eligibility requirements for drivers' licenses, or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

Paragraph (c) provides that nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities, beyond those required by this part. It is derived from a provision in the section 504 regulations that permits programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with disabilities or a given class of individuals with disabilities to be limited to those

individuals with disabilities. Section 504 ensures that federally assisted programs are made available to all individuals, without regard to disabilities, unless the Federal program under which the assistance is provided is specifically limited to individuals with disabilities or a particular class of individuals with disabilities. Because coverage under this part is not limited to federally assisted programs, paragraph (c) has been revised to clarify that State and local governments may provide special benefits, beyond those required by the nondiscrimination requirements of this part, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities.

Paragraphs (d) and (e), previously referred to in the discussion of paragraph (b)(1)(iv), provide that the public entity must administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, *i.e.*, in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible, and that persons with disabilities must be provided the option of declining to accept a particular accommodation.

Some commenters expressed concern that § 35.130(e), which states that nothing in the rule requires an individual with a disability to accept special accommodations and services provided under the ADA, could be interpreted to allow guardians of infants or older people with disabilities to refuse medical treatment for their wards. Section 35.130(e) has been revised to make it clear that paragraph (e) is inapplicable to the concern of the commenters. A new paragraph (e)(2) has been added stating that nothing in the regulation authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual. New paragraph (e) clarifies that neither the ADA nor the regulation alters current Federal law ensuring the rights of incompetent individuals with disabilities to receive food, water, and medical treatment. See, *e.g.*, Child Abuse Amendments of 1984 (42 U.S.C. 5106a(b)(10), 5106g(10)); Rehabilitation Act of 1973, as amended (29 U.S.C. 794); the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. 6042).

Sections 35.130(e) (1) and (2) are based on section 501(d) of the ADA. Section 501(d) was designed to clarify that nothing in the ADA requires individuals with disabilities to accept special accommodations and services for individuals with disabilities that may segregate them:

The Committee added this section [501(d)] to clarify that nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability. For example, a blind individual may choose not to avail himself or herself of the right to go to the front of a line, even if a particular public accommodation has chosen to offer such a modification of a policy for blind individuals. Or, a blind individual may choose to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour.

Judiciary report at 71-72. The Act is not to be construed to mean that an individual with disabilities must accept special accommodations and services for individuals with disabilities when that individual can participate in the regular services already offered. Because medical treatment, including treatment for particular conditions, is not a special accommodation or service for individuals with disabilities under section 501(d), neither the Act nor this part provides affirmative authority to suspend such treatment. Section 501(d) is intended to clarify that the Act is not designed to foster discrimination through mandatory acceptance of special services when other alternatives are provided; this concern does not reach to the provision of medical treatment for the disabling condition itself.

Paragraph (f) provides that a public entity may not place a surcharge on a particular individual with a disability, or any group of individuals with disabilities, to cover any costs of measures required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part. Such measures may include the provision of auxiliary aids or of modifications required to provide program accessibility.

Several commenters asked for clarification that the costs of interpreter services may not be assessed as an element of "court costs." The Department has already recognized that imposition of the cost of courtroom interpreter services is impermissible under section 504. The preamble to the Department's section 504 regulation for its federally assisted programs states that where a court system has an obligation to provide qualified interpreters, "it has the corresponding responsibility to pay for the services of the interpreters." (45 FR 37630 (June 3, 1980)). Accordingly, recouping the costs of interpreter services by assessing them as part of court costs would also be prohibited.

Paragraph (g), which prohibits discrimination on the basis of an individual's or entity's known relationship or association with an individual with a disability, is based on sections 102(b)(4) and 302(b)(1)(E) of the ADA. This paragraph was not contained in the proposed rule. The individuals covered under this paragraph are any individuals who are discriminated against because of their known association with an individual with a disability. For example, it would be a violation of this paragraph for a local government to refuse to allow a theater company to use a school auditorium on the grounds that the company had recently performed for an audience of individuals with HIV disease.

This protection is not limited to those who have a familial relationship with the individual who has a disability. Congress considered, and rejected, amendments that would have limited the scope of this provision to specific associations and relationships. Therefore, if a public entity refuses admission to a person with cerebral palsy and his or her companions, the companions have an independent right of action under the ADA and this section.

During the legislative process, the term "entity" was added to section 302(b)(1)(E) to clarify that the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise associated with such individuals. This provision was intended to ensure that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities.

## Section 35.131 Illegal Use of Drugs

Section 35.131 effectuates section 510 of the ADA, which clarifies the Act's application to people who use drugs illegally. Paragraph (a) provides that this part does not prohibit discrimination based on an individual's current illegal use of drugs.

The Act and the regulation distinguish between illegal use of drugs and the legal use of substances, whether or not those substances are "controlled substances," as defined in the Controlled Substances Act (21 U.S.C. 812). Some controlled substances are prescription drugs that have legitimate medical uses. Section 35.131 does not affect use of controlled substances pursuant to a valid prescription under supervision by a licensed health care professional, or other use that is authorized by the Controlled Substances Act or any other provision of Federal law. It does apply to illegal use of those substances, as well as to illegal use of controlled substances that are not prescription drugs. The key question is whether

the individual's use of the substance is illegal, not whether the substance has recognized legal uses. Alcohol is not a controlled substance, so use of alcohol is not addressed by § 35.131 (although alcoholics are individuals with disabilities, subject to the protections of the statute).

A distinction is also made between the use of a substance and the status of being addicted to that substance. Addiction is a disability, and addicts are individuals with disabilities protected by the Act. The protection, however, does not extend to actions based on the illegal use of the substance. In other words, an addict cannot use the fact of his or her addiction as a defense to an action based on illegal use of drugs. This distinction is not artificial. Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are addicted, but to provide protection to addicts so long as they are not currently using drugs.

A third distinction is the difficult one between current use and former use. The definition of "current illegal use of drugs" in § 35.104, which is based on the report of the Conference Committee, H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 64 (1990) (hereinafter "Conference report"), is "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem."

Paragraph (a)(2)(i) specifies that an individual who has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully and who is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(ii) clarifies that an individual who is currently participating in a supervised rehabilitation program and is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(iii) provides that a person who is erroneously regarded as engaging in current illegal use of drugs, but who is not engaging in such use, is protected.

Paragraph (b) provides a limited exception to the exclusion of current illegal users of drugs from the protections of the Act. It prohibits denial of health services, or services provided in connection with drug rehabilitation to an individual on the basis of current illegal use of drugs, if the individual is otherwise entitled to such services. A health care facility, such as a hospital or clinic, may not refuse treatment to an individual in need of the services it provides on the grounds that the individual is illegally using drugs, but it is not required by this section to provide services that it does not ordinarily provide. For example, a health care facility that specializes in a particular type of treatment, such as care of burn victims, is not required to provide drug rehabilitation services, but it cannot refuse to treat an individual's burns on the grounds that the individual is illegally using drugs.

Some commenters pointed out that abstention from the use of drugs is an essential condition of participation in some drug rehabilitation programs, and may be a necessary requirement in inpatient or residential settings. The Department believes that this comment is well-founded. Congress clearly intended to prohibit exclusion from drug treatment programs of the very individuals who need such programs because of their use of drugs, but, once an individual has been admitted to a program, abstention may be a necessary and appropriate condition to continued participation. The final rule therefore provides that a drug rehabilitation or treatment program may prohibit illegal use of drugs by individuals while they are participating in the program.

Paragraph (c) expresses Congress' intention that the Act be neutral with respect to testing for illegal use of drugs. This paragraph implements the provision in section 510(b) of the Act that allows entities "to adopt or administer reasonable policies or procedures, including but not limited to drug testing," that ensure that an individual who is participating in a supervised rehabilitation program, or who has completed such a program or otherwise been rehabilitated successfully is no longer engaging in the illegal use of drugs. The section is not to be "construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs."

Paragraph 35.131(c) clarifies that it is not a violation of this part to adopt or administer reasonable policies or procedures to ensure that an individual who formerly engaged in the illegal use of drugs is not currently engaging in illegal use of drugs. Any such policies or procedures must, of course, be reasonable, and must be designed to identify accurately the illegal use of drugs. This paragraph does not authorize inquiries, tests, or other procedures that would disclose use of substances that are not controlled substances or are taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law, because such uses are not included in the definition of "illegal use of drugs." A commenter argued that the rule should permit testing for lawful use of prescription drugs, but most commenters preferred that tests must be limited to unlawful use in order to avoid revealing the lawful use of prescription medicine used to treat disabilities.

## Section 35.132 Smoking

Section 35.132 restates the clarification in section 501(b) of the Act that the Act does not preclude the prohibition of, or imposition of restrictions on, smoking in transportation covered by title II. Some commenters argued that this section is too limited in scope, and that the regulation should prohibit smoking in all facilities used by public entities. The reference to smoking in section 501, however, merely clarifies that the Act does not require public entities to accommodate smokers by permitting them to smoke in transportation facilities.

## Section 35.133 Maintenance of Accessible Features

Section 35.133 provides that a public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part. The Act requires that, to the maximum extent feasible, facilities must be accessible to, and usable by, individuals with disabilities. This section recognizes that it is not sufficient to provide features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them. Inoperable elevators, locked accessible doors, or "accessible" routes that are obstructed by furniture, filing cabinets, or potted plants are neither "accessible to" nor "usable by" individuals with disabilities.

Some commenters objected that this section appeared to establish an absolute requirement and suggested that language from the preamble be included in the text of the regulation. It is, of course, impossible to guarantee that mechanical devices will never fail to operate. Paragraph (b) of the final regulation provides that this section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs. This paragraph is intended to clarify that temporary obstructions or isolated instances of mechanical failure would not be considered violations of the Act or this part. However, allowing obstructions or "out of service" equipment to persist beyond a reasonable period of time would violate this part, as would repeated mechanical failures due to improper or inadequate maintenance. Failure of the public entity to ensure that accessible routes are properly maintained and free of obstructions, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access would also violate this part.

Other commenters requested that this section be expanded to include specific requirements for inspection and maintenance of equipment, for training staff in the proper operation of equipment, and for maintenance of specific items. The Department believes that this section properly establishes the general requirement for maintaining access and that further details are not necessary.

## Section 35.134 Retaliation or Coercion

Section 35.134 implements section 503 of the ADA, which prohibits retaliation against any individual who exercises his or her rights under the Act. This section is unchanged from the proposed rule. Paragraph (a) of § 35.134 provides that no private or public entity shall discriminate against any individual because that individual has exercised his or her right to oppose any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

Paragraph (b) provides that no private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise of his or her rights under this part or because that individual aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by the Act or this part.

This section protects not only individuals who allege a violation of the Act or this part, but also any individuals who support or assist them. This section applies to all investigations or proceedings initiated under the Act or this part without regard to the ultimate resolution of the underlying allegations. Because this section prohibits any act of retaliation or coercion in response to an individual's effort to exercise rights established by the Act and this part (or to support the efforts of another individual), the section applies not only to public entities subject to this part, but also to persons acting in an individual capacity or to private entities. For example, it would be a violation of the Act and this part for a private individual to harass or intimidate an individual with a disability in an effort to prevent that individual from attending a concert in a State-owned park. It would, likewise, be a violation of the Act and this part for a private entity to take adverse action against an employee who appeared as a witness on behalf of an individual who sought to enforce the Act.

## Section 35.135 Personal Devices and Services

The final rule includes a new § 35.135, entitles "Personal devices and services," which states that the provision of personal devices and services is not required by title II. This new section, which serves as a limitation on all of the requirements of the regulation, replaces § 35.160(b)(2) of the proposed rule, which addressed the issue of personal devices and services explicitly only in the context of communications. The personal devices and services limitation was intended to have general application in the proposed rule in all contexts where it was relevant. The final rule, therefore, clarifies this point by including a general provision that will explicitly apply not only to auxiliary aids and services but across-the-board to include other relevant areas such as, for example, modifications in policies, practices, and procedures (§ 35.130(b)(7)). The language of § 35.135 parallels an analogous provision in the Department's title III regulations (28 CFR 36.306) but preserves the explicit reference to "readers for personal use or study" in § 35.160(b)(2) of the proposed rule. This section does not preclude the short-term loan of personal receivers that are part of an assistive listening system.

## Subpart C—Employment

### Section 35.140 Employment Discrimination Prohibited

Title II of the ADA applies to all activities of public entities, including their employment practices. The proposed rule cross-referenced the definitions, requirements, and procedures of title I of the ADA, as established by the Equal Employment Opportunity Commission in 29 CFR part 1630. This proposal would have resulted in use, under § 35.140, of the title I definition of "employer," so that a public entity with 25 or more employees would have become subject to the requirements of § 35.140 on July 26, 1992, one with 15 to 24 employees on July 26, 1994, and one with fewer than 15 employees would have been excluded completely.

The Department received comments objecting to this approach. The commenters asserted that Congress intended to establish nondiscrimination requirements for employment by all public entities, including those that employ fewer than 15 employees; and that Congress intended the employment requirements of title II to become effective at the same time that the other requirements of this regulation become effective, January 26, 1992. The Department has reexamined the statutory language and legislative history of the ADA on this issue and has concluded that Congress intended to cover the employment practices of all public entities and that the applicable effective date is that of title II.

The statutory language of section 204(b) of the ADA requires the Department to issue a regulation that is consistent with the ADA and the Department's coordination regulation under section 504, 28 CFR part 41. The coordination regulation specifically requires nondiscrimination in employment, 28 CFR 41.52-41.55, and does not limit coverage based on size of employer. Moreover, under all section 504 implementing regulations issued in accordance with the Department's coordination regulation, employment coverage under section 504 extends to all employers with federally assisted programs or activities, regardless of size, and the effective date for those employment requirements has always been the same as the effective date for nonemployment requirements established in the same regulations. The Department therefore concludes that § 35.140 must apply to all public entities upon the effective date of this regulation.

In the proposed regulation the Department cross-referenced the regulations implementing title I of the ADA, issued by the Equal Employment Opportunity Commission at 29 CFR part 1630, as a compliance standard for § 35.140 because, as proposed, the scope of coverage and effective date of coverage under title II would have been coextensive with title I. In the final regulation this language is modified slightly. Subparagraph (1) of new paragraph (b) makes it clear that the standards established by the Equal Employment Opportunity Commission in 29 CFR part 1630 will be the applicable compliance standards if the public entity is subject to title I. If the public entity is not covered by title I, or until it is covered by title I, subparagraph (b)(2) cross-references section 504 standards for what constitutes employment discrimination, as established by the Department of Justice in 28 CFR part 41. Standards for title I of the ADA and section 504 of the Rehabilitation Act are for the most part identical because title I of the ADA was based on requirements set forth in regulations implementing section 504.

The Department, together with the other Federal agencies responsible for the enforcement of Federal laws prohibiting employment discrimination on the basis of disability, recognizes the potential for jurisdictional overlap that exists with respect to coverage of public entities and the need to avoid problems related to overlapping coverage. The other Federal agencies include the Equal Employment Opportunity Commission, which is the agency primarily responsible for enforcement of title I of the ADA, the Department of Labor, which is the agency responsible for enforcement of section 503 of the Rehabilitation Act of 1973, and 26 Federal agencies with programs of Federal financial assistance, which are responsible for enforcing section 504 in those programs. Section 107 of the ADA requires that coordination mechanisms be developed in connection with the administrative enforcement of complaints alleging discrimination under title I and complaints alleging discrimination in employment in violation of

the Rehabilitation Act. Although the ADA does not specifically require inclusion of employment complaints under title II in the coordinating mechanisms required by title I, Federal investigations of title II employment complaints will be coordinated on a government-wide basis also. The Department is currently working with the EEOC and other affected Federal agencies to develop effective coordinating mechanisms, and final regulations on this issue will be issued on or before January 26, 1992.

## Subpart D—Program Accessibility

### Section 35.149 Discrimination Prohibited

Section 35.149 states the general nondiscrimination principle underlying the program accessibility requirements of §§ 35.150 and 35.151.

### Section 35.150 Existing Facilities

Consistent with section 204(b) of the Act, this regulation adopts the program accessibility concept found in the section 504 regulations for federally conducted programs or activities (e.g., 28 CFR part 39). The concept of "program accessibility" was first used in the section 504 regulation adopted by the Department of Health, Education, and Welfare for its federally assisted programs and activities in 1977. It allowed recipients to make their federally assisted programs and activities available to individuals with disabilities without extensive retrofitting of their existing buildings and facilities, by offering those programs through alternative methods. Program accessibility has proven to be a useful approach and was adopted in the regulations issued for programs and activities conducted by Federal Executive agencies. The Act provides that the concept of program access will continue to apply with respect to facilities now in existence, because the cost of retrofitting existing facilities is often prohibitive.

Section 35.150 requires that each service, program, or activity conducted by a public entity, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities. The regulation makes clear, however, that a public entity is not required to make each of its existing facilities accessible (§ 35.150(a)(1)). Unlike title III of the Act, which requires public accommodations to remove architectural barriers where such removal is "readily achievable," or to provide goods and services through alternative methods, where those methods are "readily achievable," title II requires a public entity to make its programs accessible in all cases, except where to do so would result in a fundamental alteration in the nature of the program or in undue financial and administrative burdens. Congress intended the "undue burden" standard in title II to be significantly higher than the "readily achievable" standard in title III. Thus, although title II may not require removal of barriers in some cases where removal would be required under title III, the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases.

Paragraph (a)(2), which establishes a special limitation on the obligation to ensure program accessibility in historic preservation programs, is discussed below in connection with paragraph (b).

Paragraph (a)(3), which is taken from the section 504 regulations for federally conducted programs, generally codifies case law that defines the scope of the public entity's obligation to ensure program accessibility. This paragraph provides that, in meeting the program accessibility requirement, a public

entity is not required to take any action that would result in a fundamental alteration in the nature of its service, program, or activity or in undue financial and administrative burdens. A similar limitation is provided in § 35.164.

This paragraph does not establish an absolute defense; it does not relieve a public entity of all obligations to individuals with disabilities. Although a public entity is not required to take actions that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity.

It is the Department's view that compliance with § 35.150(a), like compliance with the corresponding provisions of the section 504 regulations for federally conducted programs, would in most cases not result in undue financial and administrative burdens on a public entity. In determining whether financial and administrative burdens are undue, all public entity resources available for use in the funding and operation of the service, program, or activity should be considered. The burden of proving that compliance with paragraph (a) of § 35.150 would fundamentally alter the nature of a service, program, or activity or would result in undue financial and administrative burdens rests with the public entity.

The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. The Department recognizes the difficulty of identifying the official responsible for this determination, given the variety of organizational forms that may be taken by public entities and their components. The intention of this paragraph is that the determination must be made by a high level official, no lower than a Department head, having budgetary authority and responsibility for making spending decisions.

Any person who believes that he or she or any specific class of persons has been injured by the public entity head's decision or failure to make a decision may file a complaint under the compliance procedures established in subpart F.

Paragraph (b)(1) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides.

The Department wishes to clarify that, consistent with longstanding interpretation of section 504, carrying an individual with a disability is considered an ineffective and therefore an unacceptable method for achieving program accessibility. Department of Health, Education, and Welfare, Office of Civil Rights, Policy Interpretation No. 4, 43 FR 36035 (August 14, 1978). Carrying will be permitted only in manifestly exceptional cases, and only if all personnel who are permitted to participate in carrying an individual with a disability are formally instructed on the safest and least humiliating means of carrying. "Manifestly exceptional" cases in which carrying would be permitted might include, for example, programs conducted in unique facilities, such as an oceanographic vessel, for which structural changes and devices necessary to adapt the facility for use by individuals with mobility impairments are unavailable or prohibitively expensive. Carrying is not permitted as an alternative to structural modifications such as installation of a ramp or a chairlift.

In choosing among methods, the public entity shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with disabilities. Structural changes in existing facilities are required only when there is no other feasible way to make the public entity's program accessible. (It should be noted that "structural changes" include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alteration to a load-bearing structural member.) The requirements of § 35.151 for

alterations apply to structural changes undertaken to comply with this section. The public entity may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

## Historic Preservation Programs

In order to avoid possible conflict between the congressional mandates to preserve historic properties, on the one hand, and to eliminate discrimination against individuals with disabilities on the other, paragraph (a)(2) provides that a public entity is not required to take any action that would threaten or destroy the historic significance of an historic property. The special limitation on program accessibility set forth in paragraph (a)(2) is applicable only to historic preservation programs, as defined in § 35.104, that is, programs that have preservation of historic properties as a primary purpose. Narrow application of the special limitation is justified because of the inherent flexibility of the program accessibility requirement. Where historic preservation is not a primary purpose of the program, the public entity is not required to use a particular facility. It can relocate all or part of its program to an accessible facility, make home visits, or use other standard methods of achieving program accessibility without making structural alterations that might threaten or destroy significant historic features of the historic property. Thus, government programs located in historic properties, such as an historic State capitol, are not excused from the requirement for program access.

Paragraph (a)(2), therefore, will apply only to those programs that uniquely concern the preservation and experience of the historic property itself. Because the primary benefit of an historic preservation program is the experience of the historic property, paragraph (b)(2) requires the public entity to give priority to methods of providing program accessibility that permit individuals with disabilities to have physical access to the historic property. This priority on physical access may also be viewed as a specific application of the general requirement that the public entity administer programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities (§ 35.130(d)). Only when providing physical access would threaten or destroy the historic significance of an historic property, or would result in a fundamental alteration in the nature of the program or in undue financial and administrative burdens, may the public entity adopt alternative methods for providing program accessibility that do not ensure physical access. Examples of some alternative methods are provided in paragraph (b)(2).

## Time Periods

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. Like the regulations for federally assisted programs (e.g., 28 CFR 41.57(b)), paragraph (c) requires the public entity to make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation.

The proposed rule provided that, aside from structural changes, all other necessary steps to achieve compliance with this part must be taken within sixty days. The sixty day period was taken from regulations implementing section 504, which generally were effective no more than thirty days after publication. Because this regulation will not be effective until January 26, 1992, the Department has concluded that no additional transition period for non-structural changes is necessary, so the sixty day period has been omitted in the final rule. Of course, this section does not reduce or eliminate any obligations that are already applicable to a public entity under section 504.

Where structural modifications are required, paragraph (d) requires that a transition plan be developed by an entity that employs 50 or more persons, within six months of the effective date of this regulation. The legislative history of title II of the ADA makes it clear that, under title II, "local and state governments are required to provide curb cuts on public streets." Education and Labor report at 84. As the rationale for the provision of curb cuts, the House report explains, "The employment, transportation, and public accommodation sections of \*\*\* (the ADA) would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." Id. Section 35.151(e), which establishes accessibility requirements for new construction and alterations, requires that all newly constructed or altered streets, roads, or highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway, and all newly constructed or altered street level pedestrian walkways must have curb ramps or other sloped areas at intersections to streets, roads, or highways. A new paragraph (d)(2) has been added to the final rule to clarify the application of the general requirement for program accessibility to the provision of curb cuts at existing crosswalks. This paragraph requires that the transition plan include a schedule for providing curb ramps or other sloped areas at existing pedestrian walkways, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, public accommodations, and employers, followed by walkways serving other areas. Pedestrian "walkways" include locations where access is required for use of public transportation, such as bus stops that are not located at intersections or crosswalks.

Similarly, a public entity should provide an adequate number of accessible parking spaces in existing parking lots or garages over which it has jurisdiction.

Paragraph (d)(3) provides that, if a public entity has already completed a transition plan required by a regulation implementing section 504, the transition plan required by this part will apply only to those policies and practices that were not covered by the previous transition plan. Some commenters suggested that the transition plan should include all aspects of the public entity's operations, including those that may have been covered by a previous transition plan under section 504. The Department believes that such a duplicative requirement would be inappropriate. Many public entities may find, however, that it will be simpler to include all of their operations in the transition plan than to attempt to identify and exclude specifically those that were addressed in a previous plan. Of course, entities covered under section 504 are not shielded from their obligations under that statute merely because they are included under the transition plan developed under this section.

## Section 35.151 New Construction and Alterations

Section 35.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of a public entity shall be designed, constructed, or altered to be readily accessible to and usable by individuals with disabilities if the construction was commenced after the effective date of this part. Facilities under design on that date will be governed by this section if the date that bids were invited falls after the effective date. This interpretation is consistent with Federal practice under section 504.

Section 35.151(c) establishes two standards for accessible new construction and alteration. Under paragraph (c), design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (hereinafter ADAAG) shall be deemed to comply with the requirements of this section with respect to those facilities except that, if ADAAG is chosen, the elevator exemption contained at §§ 36.401(d) and 36.404 does not apply. ADAAG is the standard for private buildings and was issued as guidelines by the Architectural and Transportation Barriers Compliance Board (ATBCB) under title III of the ADA. It has been adopted by the Department of Justice and is published as appendix A to the Department's title III rule in today's FEDERAL REGISTER. Departures from particular

requirements of these standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided. Use of two standards is a departure from the proposed rule.

The proposed rule adopted UFAS as the only interim accessibility standard because that standard was referenced by the regulations implementing section 504 of the Rehabilitation Act promulgated by most Federal funding agencies. It is, therefore, familiar to many State and local government entities subject to this rule. The Department, however, received many comments objecting to the adoption of UFAS. Commenters pointed out that, except for the elevator exemption, UFAS is not as stringent as ADAAG. Others suggested that the standard should be the same to lessen confusion.

Section 204(b) of the Act states that title II regulations must be consistent not only with section 504 regulations but also with "this Act." Based on this provision, the Department has determined that a public entity should be entitled to choose to comply either with ADAAG or UFAS.

Public entities who choose to follow ADAAG, however, are not entitled to the elevator exemption contained in title III of the Act and implemented in the title III regulation at § 36.401(d) for new construction and § 36.404 for alterations. Section 303(b) of title III states that, with some exceptions, elevators are not required in facilities that are less than three stories or have less than 3000 square feet per story. The section 504 standard, UFAS, contains no such exemption. Section 501 of the ADA makes clear that nothing in the Act may be construed to apply a lesser standard to public entities than the standards applied under section 504. Because permitting the elevator exemption would clearly result in application of a lesser standard than that applied under section 504, paragraph (c) states that the elevator exemption does not apply when public entities choose to follow ADAAG. Thus, a two-story courthouse, whether built according to UFAS or ADAAG, must be constructed with an elevator. It should be noted that Congress did not include an elevator exemption for public transit facilities covered by subtitle B of title II, which covers public transportation provided by public entities, providing further evidence that Congress intended that public buildings have elevators.

Section 504 of the ADA requires the ATBCB to issue supplemental Minimum Guidelines and Requirements for Accessible Design of buildings and facilities subject to the Act, including title II. Section 204(c) of the ADA provides that the Attorney General shall promulgate regulations implementing title II that are consistent with the ATBCB's ADA guidelines. The ATBCB has announced its intention to issue title II guidelines in the future. The Department anticipates that, after the ATBCB's title II guidelines have been published, this rule will be amended to adopt new accessibility standards consistent with the ATBCB's rulemaking. Until that time, however, public entities will have a choice of following UFAS or ADAAG, without the elevator exemption.

Existing buildings leased by the public entity after the effective date of this part are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in § 35.150. To the extent the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of § 35.151.

The Department received many comments urging that the Department require that public entities lease only accessible buildings. Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Section 204(b) of the Act states that, in the area of "program accessibility, existing facilities," the title II regulations must be consistent with section 504 regulations. Thus, the Department has adopted the section 504 principles for these types of leased buildings. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction

standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the same program accessibility standard should apply to both owned and leased existing buildings. Similarly, requiring that public entities only lease accessible space would significantly restrict the options of State and local governments in seeking leased space, which would be particularly burdensome in rural or sparsely populated areas.

On the other hand, the more accessible the leased space is, the fewer structural modifications will be required in the future for particular employees whose disabilities may necessitate barrier removal as a reasonable accommodation. Pursuant to the requirements for leased buildings contained in the Minimum Guidelines and Requirements for Accessible Design published under the Architectural Barriers Act by the ATBCB, 36 CFR 1190.34, the Federal Government may not lease a building unless it contains (1) One accessible route from an accessible entrance to those areas in which the principal activities for which the building is leased are conducted, (2) accessible toilet facilities, and (3) accessible parking facilities, if a parking area is included within the lease (36 CFR 1190.34). Although these requirements are not applicable to buildings leased by public entities covered by this regulation, such entities are encouraged to look for the most accessible space available to lease and to attempt to find space complying at least with these minimum Federal requirements.

Section 35.151(d) gives effect to the intent of Congress, expressed in section 504(c) of the Act, that this part recognize the national interest in preserving significant historic structures. Commenters criticized the Department's use of descriptive terms in the proposed rule that are different from those used in the ADA to describe eligible historic properties. In addition, some commenters criticized the Department's decision to use the concept of "substantially impairing" the historic features of a property, which is a concept employed in regulations implementing section 504 of the Rehabilitation Act of 1973. Those commenters recommended that the Department adopt the criteria of "adverse effect" published by the Advisory Council on Historic Preservation under the National Historic Preservation Act, 36 CFR 800.9, as the standard for determining whether an historic property may be altered.

The Department agrees with these comments to the extent that they suggest that the language of the rule should conform to the language employed by Congress in the ADA. A definition of "historic property," drawn from section 504 of the ADA, has been added to § 35.104 to clarify that the term applies to those properties listed or eligible for listing in the National Register of Historic Places, or properties designated as historic under State or local law.

The Department intends that the exception created by this section be applied only in those very rare situations in which it is not possible to provide access to an historic property using the special access provisions established by UFAS and ADAAG. Therefore, paragraph (d)(1) of § 35.151 has been revised to clearly state that alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG. Paragraph (d)(2) has been revised to provide that, if it has been determined under the procedures established in UFAS and ADAAG that it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the property, alternative methods of access shall be provided pursuant to the requirements of § 35.150.

In response to comments, the Department has added to the final rule a new paragraph (e) setting out the requirements of § 36.151 as applied to curb ramps. Paragraph (e) is taken from the statement contained in the preamble to the proposed rule that all newly constructed or altered streets, roads, and highways must contain curb ramps at any intersection having curbs or other barriers to entry from a street level pedestrian walkway, and that all newly constructed or altered street level pedestrian walkways must have curb ramps at intersections to streets, roads, or highways.

## Subpart E—Communications

### Section 35.160 General

Section 35.160 requires the public entity to take such steps as may be necessary to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

Paragraph (b)(1) requires the public entity to furnish appropriate auxiliary aids and services when necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, the public entity's service, program, or activity. The public entity must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice. This expressed choice shall be given primary consideration by the public entity (§ 35.160(b)(2)). The public entity shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 35.164.

Deference to the request of the individual with a disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication. For instance, some courtrooms are now equipped for "computer-assisted transcripts," which allow virtually instantaneous transcripts of courtroom argument and testimony to appear on displays. Such a system might be an effective auxiliary aid or service for a person who is deaf or has a hearing loss who uses speech to communicate, but may be useless for someone who uses sign language.

Although in some circumstances a notepad and written materials may be sufficient to permit effective communication, in other circumstances they may not be sufficient. For example, a qualified interpreter may be necessary when the information being communicated is complex, or is exchanged for a lengthy period of time. Generally, factors to be considered in determining whether an interpreter is required include the context in which the communication is taking place, the number of people involved, and the importance of the communication.

Several commenters asked that the rule clarify that the provision of readers is sometimes necessary to ensure access to a public entity's services, programs or activities. Reading devices or readers should be provided when necessary for equal participation and opportunity to benefit from any governmental service, program, or activity, such as reviewing public documents, examining demonstrative evidence, and filling out voter registration forms or forms needed to receive public benefits. The importance of providing qualified readers for examinations administered by public entities is discussed under § 35.130. Reading devices and readers are appropriate auxiliary aids and services where necessary to permit an individual with a disability to participate in or benefit from a service, program, or activity.

Section 35.160(b)(2) of the proposed rule, which provided that a public entity need not furnish individually prescribed devices, readers for personal use or study, or other devices of a personal nature, has been deleted in favor of a new section in the final rule on personal devices and services (see § 35.135).

In response to comments, the term "auxiliary aids and services" is used in place of "auxiliary aids" in the final rule. This phrase better reflects the range of aids and services that may be required under this section.

A number of comments raised questions about the extent of a public entity's obligation to provide access to television programming for persons with hearing impairments. Television and videotape programming produced by public entities are covered by this section. Access to audio portions of such programming may be provided by closed captioning.

## Section 35.161 Telecommunication Devices for the Deaf (TDD's)

Section 35.161 requires that, where a public entity communicates with applicants and beneficiaries by telephone, TDD's or equally effective telecommunication systems be used to communicate with individuals with impaired speech or hearing.

Problems arise when a public entity which does not have a TDD needs to communicate with an individual who uses a TDD or vice versa. Title IV of the ADA addresses this problem by requiring establishment of telephone relay services to permit communications between individuals who communicate by TDD and individuals who communicate by the telephone alone. The relay services required by title IV would involve a relay operator using both a standard telephone and a TDD to type the voice messages to the TDD user and read the TDD messages to the standard telephone user.

Section 204(b) of the ADA requires that the regulation implementing title II with respect to communications be consistent with the Department's regulation implementing section 504 for its federally conducted programs and activities at 28 CFR part 39. Section 35.161, which is taken from § 39.160(a)(2) of that regulation, requires the use of TDD's or equally effective telecommunication systems for communication with people who use TDD's. Of course, where relay services, such as those required by title IV of the ADA are available, a public entity may use those services to meet the requirements of this section.

Many commenters were concerned that public entities should not rely heavily on the establishment of relay services. The commenters explained that while relay services would be of vast benefit to both public entities and individuals who use TDD's, the services are not sufficient to provide access to all telephone services. First, relay systems do not provide effective access to the increasingly popular automated systems that require the caller to respond by pushing a button on a touch tone phone. Second, relay systems cannot operate fast enough to convey messages on answering machines, or to permit a TDD user to leave a recorded message. Third, communication through relay systems may not be appropriate in cases of crisis lines pertaining to rape, domestic violence, child abuse, and drugs. The Department believes that it is more appropriate for the Federal Communications Commission to address these issues in its rulemaking under title IV.

Some commenters requested that those entities with frequent contacts with clients who use TDD's have on-site TDD's to provide for direct communication between the entity and the individual. The Department encourages those entities that have extensive telephone contact with the public such as city halls, public libraries, and public aid offices, to have TDD's to insure more immediate access. Where the provision of telephone service is a major function of the entity, TDD's should be available.

## Section 35.162 Telephone Emergency Services

Many public entities provide telephone emergency services by which individuals can seek immediate assistance from police, fire, ambulance, and other emergency services. These telephone emergency services—including "911" services—are clearly an important public service whose reliability can be a matter of life or death. The legislative

history of title II specifically reflects congressional intent that public entities must ensure that telephone emergency services, including 911 services, be accessible to persons with impaired hearing and speech through telecommunication technology (Conference report at 67; Education and Labor report at 84-85).

Proposed § 35.162 mandated that public entities provide emergency telephone services to persons with disabilities that are “functionally equivalent” to voice services provided to others. Many commenters urged the Department to revise the section to make clear that direct access to telephone emergency services is required by title II of the ADA as indicated by the legislative history (Conference report at 67-68; Education and Labor report at 85). In response, the final rule mandates “direct access,” instead of “access that is functionally equivalent” to that provided to all other telephone users. Telephone emergency access through a third party or through a relay service would not satisfy the requirement for direct access.

Several commenters asked about a separate seven-digit emergency call number for the 911 services. The requirement for direct access disallows the use of a separate seven-digit number where 911 service is available. Separate seven-digit emergency call numbers would be unfamiliar to many individuals and also more burdensome to use. A standard emergency 911 number is easier to remember and would save valuable time spent in searching in telephone books for a local seven-digit emergency number.

Many commenters requested the establishment of minimum standards of service (e.g., the quantity and location of TDD's and computer modems needed in a given emergency center). Instead of establishing these scoping requirements, the Department has established a performance standard through the mandate for direct access.

Section 35.162 requires public entities to take appropriate steps, including equipping their emergency systems with modern technology, as may be necessary to promptly receive and respond to a call from users of TDD's and computer modems. Entities are allowed the flexibility to determine what is the appropriate technology for their particular needs. In order to avoid mandating use of particular technologies that may become outdated, the Department has eliminated the references to the Baudot and ASCII formats in the proposed rule.

Some commenters requested that the section require the installation of a voice amplification device on the handset of the dispatcher's telephone to amplify the dispatcher's voice. In an emergency, a person who has a hearing loss may be using a telephone that does not have an amplification device. Installation of speech amplification devices on the handsets of the dispatchers' telephones would respond to that situation. The Department encourages their use.

Several commenters emphasized the need for proper maintenance of TDD's used in telephone emergency services. Section 35.133, which mandates maintenance of accessible features, requires public entities to maintain in operable working condition TDD's and other devices that provide direct access to the emergency system.

## Section 35.163 Information and Signage

Section 35.163(a) requires the public entity to provide information to individuals with disabilities concerning accessible services, activities, and facilities. Paragraph (b) requires the public entity to provide signage at all inaccessible entrances to each of its facilities that directs users to an accessible entrance or to a location with information about accessible facilities.

Several commenters requested that, where TDD-equipped pay phones or portable TDD's exist, clear signage should be posted indicating the location of the TDD. The Department believes that this is required by paragraph (a). In addition, the Department recommends that, in large buildings that house TDD's, directional signage indicating the location of available TDD's should be placed adjacent to banks of telephones that do not contain a TDD.

## Section 35.164 Duties

Section 35.164, like paragraph (a)(3) of § 35.150, is taken from the section 504 regulations for federally conducted programs. Like paragraph (a)(3), it limits the obligation of the public entity to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it. It also includes specific requirements for determining the existence of undue financial and administrative burdens. The preamble discussion of § 35.150(a) regarding that determination is applicable to this section and further explains the public entity's obligation to comply with §§ 35.160-35.164. Because of the essential nature of the services provided by telephone emergency systems, the Department assumes that § 35.164 will rarely be applied to § 35.162.

## Subpart F—Compliance Procedures

Subpart F sets out the procedures for administrative enforcement of this part. Section 203 of the Act provides that the remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) for enforcement of section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of handicap in programs and activities that receive Federal financial assistance, shall be the remedies, procedures, and rights for enforcement of title II. Section 505, in turn, incorporates by reference the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d to 2000d-4a). Title VI, which prohibits discrimination on the basis of race, color, or national origin in federally assisted programs, is enforced by the Federal agencies that provide the Federal financial assistance to the covered programs and activities in question. If voluntary compliance cannot be achieved, Federal agencies enforce title VI either by the termination of Federal funds to a program that is found to discriminate, following an administrative hearing, or by a referral to this Department for judicial enforcement.

Title II of the ADA extended the requirements of section 504 to all services, programs, and activities of State and local governments, not only those that receive Federal financial assistance. The House Committee on Education and Labor explained the enforcement provisions as follows:

It is the Committee's intent that administrative enforcement of section 202 of the legislation should closely parallel the Federal government's experience with section 504 of the Rehabilitation Act of 1973. The Attorney General should use section 504 enforcement procedures and the Department's coordination role under Executive Order 12250 as models for regulation in this area.

The Committee envisions that the Department of Justice will identify appropriate Federal agencies to oversee compliance activities for State and local governments. As with section 504, these Federal agencies, including the Department of Justice, will receive, investigate, and where possible, resolve complaints of discrimination. If a Federal agency is unable to resolve a complaint by voluntary means, \* \* \* the major enforcement sanction for the Federal government will be referral of cases by these Federal agencies to the Department of Justice.

The Department of Justice may then proceed to file suits in Federal district court. As with section 504, there is also a private right of action for persons with disabilities, which includes the full panoply of remedies. Again, consistent with section 504, it is not the Committee's intent that persons with disabilities need to exhaust Federal administrative remedies before exercising their private right of action.

Education & Labor report at 98. See also S. Rep. No. 116, 101st Cong., 1st Sess., at 57-58 (1989).

Subpart F effectuates the congressional intent by deferring to section 504 procedures where those procedures are applicable, that is, where a Federal agency has jurisdiction under section 504 by virtue of its provision of Federal financial assistance to the program or activity in which the discrimination is alleged to have occurred. Deferral to the 504 procedures also makes the sanction of fund termination available where necessary to achieve compliance. Because the Civil Rights Restoration Act (Pub. L. 100-259) extended the application of section 504 to all of the operations of the public entity receiving the Federal financial assistance, many activities of State and local governments are already covered by section 504. The procedures in subpart F apply to complaints concerning services, programs, and activities of public entities that are covered by the ADA.

Subpart G designates the Federal agencies responsible for enforcing the ADA with respect to specific components of State and local government. It does not, however, displace existing jurisdiction under section 504 of the various funding agencies. Individuals may still file discrimination complaints against recipients of Federal financial assistance with the agencies that provide that assistance, and the funding agencies will continue to process those complaints under their existing procedures for enforcing section 504. The substantive standards adopted in this part for title II of the ADA are generally the same as those required under section 504 for federally assisted programs, and public entities covered by the ADA are also covered by the requirements of section 504 to the extent that they receive Federal financial assistance. To the extent that title II provides greater protection to the rights of individuals with disabilities, however, the funding agencies will also apply the substantive requirements established under title II and this part in processing complaints covered by both this part and section 504, except that fund termination procedures may be used only for violations of section 504.

Subpart F establishes the procedures to be followed by the agencies designated in subpart G for processing complaints against State and local government entities when the designated agency does not have jurisdiction under section 504.

## Section 35.170 Complaints

Section 35.170 provides that any individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part within 180 days of the date of the alleged discrimination, unless the time for filing is extended by the agency for good cause. Although § 35.107 requires public entities that employ 50 or more persons to establish grievance procedures for resolution of complaints, exhaustion of those procedures is not a prerequisite to filing a complaint under this section. If a complainant chooses to follow the public entity's grievance procedures, however, any resulting delay may be considered good cause for extending the time allowed for filing a complaint under this part.

Filing the complaint with any Federal agency will satisfy the requirement for timely filing. As explained below, a complaint filed with an agency that has jurisdiction under section 504 will be processed under the agency's procedures for enforcing section 504.

Some commenters objected to the complexity of allowing complaints to be filed with different agencies. The multiplicity of enforcement jurisdiction is the result of following the statutorily mandated enforcement scheme. The Department has, however, attempted to simplify procedures for complainants by making the Federal agency that receives the complaint responsible for referring it to an appropriate agency.

The Department has also added a new paragraph (c) to this section providing that a complaint may be filed with any agency designated under subpart G of this part, or with any agency that provides funding to the public entity that is the subject of the complaint, or with the Department of Justice. Under § 35.171(a)(2), the Department of Justice will refer complaints for which it does not have jurisdiction under section 504 to an agency that does have jurisdiction under section 504, or to the agency designated under subpart G as responsible for complaints filed against the public entity that is the subject of the complaint or in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission. Complaints filed with the Department of Justice may be sent to the Coordination and Review Section, P.O. Box 66118, Civil Rights Division, U.S. Department of Justice, Washington, DC 20035-6118.

## Section 35.171 Acceptance of Complaints

Section 35.171 establishes procedures for determining jurisdiction and responsibility for processing complaints against public entities. The final rule provides complainants an opportunity to file with the Federal funding agency of their choice. If that agency does not have jurisdiction under section 504, however, and is not the agency designated under subpart G as responsible for that public entity, the agency must refer the complaint to the Department of Justice, which will be responsible for referring it either to an agency that does have jurisdiction under section 504 or to the appropriate designated agency, or in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission.

Whenever an agency receives a complaint over which it has jurisdiction under section 504, it will process the complaint under its section 504 procedures. When the agency designated under subpart G receives a complaint for which it does not have jurisdiction under section 504, it will treat the complaint as an ADA complaint under the procedures established in this subpart.

Section 35.171 also describes agency responsibilities for the processing of employment complaints. As described in connection with § 35.140, additional procedures regarding the coordination of employment complaints will be established in a coordination regulation issued by DOJ and EEOC. Agencies with jurisdiction under section 504 for complaints alleging employment discrimination also covered by title I will follow the procedures established by the coordination regulation for those complaints. Complaints covered by title I but not section 504 will be referred to the EEOC, and complaints covered by this part but not title I will be processed under the procedures in this part.

## Section 35.172 Resolution of Complaints

Section 35.172 requires the designated agency to either resolve the complaint or issue to the complainant and the public entity a Letter of Findings containing findings of fact and conclusions of law and a description of a remedy for each violation found.

The Act requires the Department of Justice to establish administrative procedures for resolution of complaints, but does not require complainants to exhaust these administrative remedies. The Committee Reports make clear that Congress intended to provide a private right of action with the full panoply of remedies for individual victims of discrimination. Because the Act does not require exhaustion of administrative remedies, the complainant may elect to proceed with a private suit at any time.

## **Section 35.173 Voluntary Compliance Agreements**

Section 35.173 requires the agency to attempt to resolve all complaints in which it finds noncompliance through voluntary compliance agreements enforceable by the Attorney General.

## **Section 35.174 Referral**

Section 35.174 provides for referral of the matter to the Department of Justice if the agency is unable to obtain voluntary compliance.

## **Section 35.175 Attorney's Fees**

Section 35.175 states that courts are authorized to award attorneys fees, including litigation expenses and costs, as provided in section 505 of the Act. Litigation expenses include items such as expert witness fees, travel expenses, etc. The Judiciary Committee Report specifies that such items are included under the rubric of "attorneys fees" and not "costs" so that such expenses will be assessed against a plaintiff only under the standard set forth in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978). (Judiciary report at 73.)

## **Section 35.176 Alternative Means of Dispute Resolution**

Section 35.176 restates section 513 of the Act, which encourages use of alternative means of dispute resolution.

## **Section 35.177 Effect of Unavailability of Technical Assistance**

Section 35.177 explains that, as provided in section 506(e) of the Act, a public entity is not excused from compliance with the requirements of this part because of any failure to receive technical assistance.

## **Section 35.178 State Immunity**

Section 35.178 restates the provision of section 502 of the Act that a State is not immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court for violations of the Act, and that the same remedies are available for any such violations as are available in an action against an entity other than a State.

## **Subpart G—Designated Agencies**

## Section 35.190 Designated Agencies

Subpart G designates the Federal agencies responsible for investigating complaints under this part. At least 26 agencies currently administer programs of Federal financial assistance that are subject to the nondiscrimination requirements of section 504 as well as other civil rights statutes. A majority of these agencies administer modest programs of Federal financial assistance and/or devote minimal resources exclusively to "external" civil rights enforcement activities. Under Executive Order 12250, the Department of Justice has encouraged the use of delegation agreements under which certain civil rights compliance responsibilities for a class of recipients funded by more than one agency are delegated by an agency or agencies to a "lead" agency. For example, many agencies that fund institutions of higher education have signed agreements that designate the Department of Education as the "lead" agency for this class of recipients.

The use of delegation agreements reduces overlap and duplication of effort, and thereby strengthens overall civil rights enforcement. However, the use of these agreements to date generally has been limited to education and health care recipients. These classes of recipients are funded by numerous agencies and the logical connection to a lead agency is clear (e.g., the Department of Education for colleges and universities, and the Department of Health and Human Services for hospitals).

The ADA's expanded coverage of State and local government operations further complicates the process of establishing Federal agency jurisdiction for the purpose of investigating complaints of discrimination on the basis of disability. Because all operations of public entities now are covered irrespective of the presence or absence of Federal financial assistance, many additional State and local government functions and organizations now are subject to Federal jurisdiction. In some cases, there is no historical or single clear-cut subject matter relationship with a Federal agency as was the case in the education example described above. Further, the 33,000 governmental jurisdictions subject to the ADA differ greatly in their organization, making a detailed and workable division of Federal agency jurisdiction by individual State, county, or municipal entity unrealistic.

This regulation applies the delegation concept to the investigation of complaints of discrimination on the basis of disability by public entities under the ADA. It designates eight agencies, rather than all agencies currently administering programs of Federal financial assistance, as responsible for investigating complaints under this part. These "designated agencies" generally have the largest civil rights compliance staffs, the most experience in complaint investigations and disability issues, and broad yet clear subject area responsibilities. This division of responsibilities is made functionally rather than by public entity type or name designation. For example, all entities (regardless of their title) that exercise responsibilities, regulate, or administer services or programs relating to lands and natural resources fall within the jurisdiction of the Department of Interior.

Complaints under this part will be investigated by the designated agency most closely related to the functions exercised by the governmental component against which the complaint is lodged. For example, a complaint against a State medical board, where such a board is a recognizable entity, will be investigated by the Department of Health and Human Services (the designated agency for regulatory activities relating to the provision of health care), even if the board is part of a general umbrella department of planning and regulation (for which the Department of Justice is the designated agency). If two or more agencies have apparent responsibility over a complaint, § 35.190(c) provides that the Assistant Attorney General shall determine which one of the agencies shall be the designated agency for purposes of that complaint.

Thirteen commenters, including four proposed designated agencies, addressed the Department of Justice's identification in the proposed regulation of nine "designated agencies" to investigate complaints under this part. Most comments addressed the proposed specific delegations to the various individual agencies. The Department of Justice agrees with several commenters who pointed out that responsibility for "historic and cultural preservation" functions appropriately belongs with the Department of Interior rather than the Department of Education. The Department of Justice also agrees with the Department of Education that "museums" more appropriately should be delegated to the Department of Interior, and that "preschool and daycare programs" more appropriately should be assigned to the Department of Health and Human Services, rather than to the Department of Education. The final rule reflects these decisions.

The Department of Commerce opposed its listing as the designated agency for "commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business". The Department of Commerce cited its lack of a substantial existing section 504 enforcement program and experience with many of the specific functions to be delegated. The Department of Justice accedes to the Department of Commerce's position, and has assigned itself as the designated agency for these functions.

In response to a comment from the Department of Health and Human Services, the regulation's category of "medical and nursing schools" has been clarified to read "schools of medicine, dentistry, nursing, and other health-related fields". Also in response to a comment from the Department of Health and Human Services, "correctional institutions" have been specifically added to the public safety and administration of justice functions assigned to the Department of Justice.

The regulation also assigns the Department of Justice as the designated agency responsible for all State and local government functions not assigned to other designated agencies. The Department of Justice, under an agreement with the Department of the Treasury, continues to receive and coordinate the investigation of complaints filed under the Revenue Sharing Act. This entitlement program, which was terminated in 1986, provided civil rights compliance jurisdiction for a wide variety of complaints regarding the use of Federal funds to support various general activities of local governments. In the absence of any similar program of Federal financial assistance administered by another Federal agency, placement of designated agency responsibilities for miscellaneous and otherwise undesignated functions with the Department of Justice is an appropriate continuation of current practice.

The Department of Education objected to the proposed rule's inclusion of the functional area of "arts and humanities" within its responsibilities, and the Department of Housing and Urban Development objected to its proposed designation as responsible for activities relating to rent control, the real estate industry, and housing code enforcement. The Department has deleted these areas from the lists assigned to the Departments of Education and Housing and Urban Development, respectively, and has added a new paragraph (c) to § 35.190, which provides that the Department of Justice may assign responsibility for components of State or local governments that exercise responsibilities, regulate, or administer services, programs, or activities relating to functions not assigned to specific designated agencies by paragraph (b) of this section to other appropriate agencies. The Department believes that this approach will provide more flexibility in determining the appropriate agency for investigation of complaints involving those components of State and local governments not specifically addressed by the listings in paragraph (b). As provided in §§ 35.170 and 35.171, complaints filed with the Department of Justice will be referred to the appropriate agency.

Several commenters proposed a stronger role for the Department of Justice, especially with respect to the receipt and assignment of complaints, and the overall monitoring of the effectiveness of the enforcement activities of Federal agencies. As discussed above, §§ 35.170 and 35.171 have been revised to provide for referral of complaints

by the Department of Justice to appropriate enforcement agencies. Also, language has been added to § 35.190(a) of the final regulation stating that the Assistant Attorney General shall provide policy guidance and interpretations to designated agencies to ensure the consistent and effective implementation of this part.

[Order No. 1512-91, 56 FR 35716, July 26, 1991, redesignated by AG Order No. 3180-2010, 75 FR 56184, Sept. 15, 2010]

## **Appendix C to Part 35— Guidance to Revisions to ADA Title II and Title III Regulations Revising the Meaning and Interpretation of the Definition of “Disability” and Other Provisions in Order To Incorporate the Requirements of the ADA Amendments Act**

Note: This appendix contains guidance providing a section-by-section analysis of the revisions to 28 CFR parts 35 and 36 published on August 11, 2016.

### **Guidance and Section-by-Section Analysis**

This section provides a detailed description of the Department's changes to the meaning and interpretation of the definition of “disability” in the title II and title III regulations, the reasoning behind those changes, and responses to public comments received on these topics. See Office of the Attorney General; Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 79 FR 4839 (Jan. 30, 2014) (NPRM).

### **Sections 35.101 and 36.101—Purpose and Broad Coverage**

Sections 35.101 and 36.101 set forth the purpose of the ADA title II and title III regulations. In the NPRM, the Department proposed revising these sections by adding references to the ADA Amendments Act in renumbered §§ 35.101(a) and 36.101(a) and by adding new §§ 35.101(b) and 36.101(b), which explain that the ADA is intended to have broad coverage and that the definition of “disability” shall be construed broadly. The proposed language in paragraph (b) stated that the primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of “disability” in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in ADA cases should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability should not demand extensive analysis.

Many commenters supported inclusion of this information as reiterating the statutory language evincing Congress' intention “to restore a broad definition of ‘disability’ under the ADA. . . .” Several commenters asked the Department to delete the last sentence in §§ 35.101(b) and 36.101(b), arguing that inclusion of this language is inconsistent with the individualized assessment required under the ADA. Some of these commenters acknowledged, however, that this language is drawn directly from the “Purposes” of the ADA Amendments Act. See Public Law 110-325, sec. 2(b)(5). The Department declines to remove this sentence from the final rule. In addition to directly quoting the statute, the Department believes that this language neither precludes nor is inconsistent with conducting an individualized assessment of whether an individual is covered by the ADA.

Some commenters recommended that the Department add a third paragraph to these sections expressly stating that “not all impairments are covered disabilities.” These commenters contended that “[t]here is a common misperception that having a diagnosed impairment automatically triggers coverage under the ADA.” While the Department does not agree that such a misperception is common, it agrees that it would be appropriate to include such a statement in the final rule, and has added it to the rules of construction explaining the phrase “substantially limits” at §§ 35.108(d)(1)(v) and 36.105(d)(1)(v).

## Sections 35.104 and 36.104—Definitions

The current title II and title III regulations include the definition of “disability” in regulatory sections that contain all enumerated definitions in alphabetical order. Given the expanded length of the definition of “disability” and the number of additional subsections required in order to give effect to the requirements of the ADA Amendments Act, the Department, in the NPRM, proposed moving the definition of “disability” from the general definitional sections at §§ 35.104 and 36.104 to a new section in each regulation, §§ 35.108 and 36.105, respectively.

The Department received no public comments in response to this proposal and the definition of “disability” remains in its own sections in the final rule.

## Sections 35.108(a)(1) and 36.105(a)(1) Definition of “disability”—General

In the ADA, Congress originally defined “disability” as “(A) a physical or mental impairment that substantially limits one or more major life activities of an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” Public Law 101-336, sec. 3 (1990). This three-part definition—the “actual,” “record of,” and “regarded as” prongs—was modeled after the definition of “handicap” found in the Rehabilitation Act of 1973. H.R. Rep. No. 110-730, pt. 2, at 6 (2008). The Department’s 1991 title II and title III ADA regulations reiterate this three-part basic definition as follows:

Disability means, with respect to an individual,

- a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- a record of such an impairment; or
- being regarded as having such an impairment.

56 FR 35694, 35717 (July 26, 1991); 56 FR 35544, 35548 (July 26, 1991).

While the ADA Amendments Act did not amend the basic structure or terminology of the original statutory definition of “disability,” the Act revised the third prong to incorporate by reference two specific provisions construing this prong. 42 U.S.C. 12102(3)(A)-(B). The first statutory provision clarified the scope of the “regarded as” prong by explaining that “[a]n individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. 12102(3)(A). The second statutory provision provides an exception to the “regarded as” prong for impairments that are both transitory and minor. A transitory impairment is defined as “an impairment with

an actual or expected duration of 6 months or less.” 42 U.S.C. 12102(3)(B). In the NPRM, the Department proposed revising the “regarded as” prong in §§ 35.108(a)(1)(iii) and 36.105(a)(1)(iii) to reference the regulatory provisions that implement 42 U.S.C. 12102(3). The NPRM proposed, at §§ 35.108(f) and 36.105(f), that “regarded as” having an impairment would mean that the individual has been subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not both “transitory and minor.”

The first proposed sentence directed that the meaning of the “regarded as” prong shall be understood in light of the requirements in §§ 35.108(f) and 36.105(f). The second proposed sentence merely provided a summary restatement of the requirements of §§ 35.108(f) and 36.105(f). The Department received no comments in response to this proposed language. Upon consideration, however, the Department decided to retain the first proposed sentence but omit the second as superfluous. Because the first sentence explicitly incorporates and directs the public to the requirements set out in §§ 35.108(f) and 36.105(f), the Department believes that summarizing those requirements here is unnecessary. Accordingly, in the final rule, §§ 35.108(a)(1)(iii) and 36.105(a)(1)(iii) simply reference paragraph (f) of the respective section. See also, discussion in the Guidance and Section-by-Section analysis of §§ 35.108(f) and 36.105(f), below.

## Sections 35.108(a)(2) and 36.105(a)(2) Definition of “disability”—Rules of Construction

In the NPRM, the Department proposed §§ 35.108(a)(2) and 36.105(a)(2), which set forth rules of construction on how to apply the definition of “disability.” Proposed §§ 35.108(a)(2)(i) and 36.105(a)(2)(i) state that an individual may establish coverage under any one or more of the prongs in the definition of “disability”—the “actual disability” prong in paragraph (a)(1)(i), the “record of” prong in paragraph (a)(1)(ii) or the “regarded as” prong in paragraph (a)(1)(iii). See §§ 35.108(a)(1)(i) through (iii); 36.105(a)(1)(i) through (iii). The NPRM’s inclusion of rules of construction stemmed directly from the ADA Amendments Act, which amended the ADA to require that the definition of “disability” be interpreted in conformance with several specific directives and an overarching mandate to ensure “broad coverage . . . to the maximum extent permitted by the terms of [the ADA].” 42 U.S.C. 12102(4)(A).

To be covered under the ADA, an individual must satisfy only one prong. The term “actual disability” is used in these rules of construction as shorthand terminology to refer to an impairment that substantially limits a major life activity within the meaning of the first prong of the definition of “disability.” See §§ 35.108(a)(1)(i); 36.105(a)(1)(i). The terminology selected is for ease of reference. It is not intended to suggest that an individual with a disability who is covered under the first prong has any greater rights under the ADA than an individual who is covered under the “record of” or “regarded as” prongs, with the exception that the ADA Amendments Act revised the ADA to expressly state that an individual who meets the definition of “disability” solely under the “regarded as” prong is not entitled to reasonable modifications of policies, practices, or procedures. See 42 U.S.C. 12201(h).

Proposed §§ 35.108(a)(2)(ii) and 36.105(a)(2)(ii) were intended to incorporate Congress’s expectation that consideration of coverage under the “actual disability” and “record of disability” prongs of the definition of “disability” will generally be unnecessary except in cases involving requests for reasonable modifications. See 154 Cong. Rec. H6068 (daily ed. June 25, 2008) (joint statement of Reps. Steny Hoyer and Jim Sensenbrenner). Accordingly, these provisions state that, absent a claim that a covered entity has failed to provide reasonable modifications, typically it is not necessary to rely on the “actual disability” or “record of” disability prongs. Instead, in such cases, the coverage can be evaluated exclusively under the “regarded as” prong, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. Whether or not an individual is challenging a covered entity’s failure to provide reasonable modifications, the individual may nevertheless proceed under the “actual disability” or “record of” prong. The Department notes, however, that where

an individual is challenging a covered entity's failure to provide effective communication, that individual cannot rely solely on the "regarded as prong" because the entitlement to an auxiliary aid or service is contingent on a disability-based need for the requested auxiliary aid or service. See 28 CFR 35.160(b), 28 CFR 36.303(c).

The Department received no comments objecting to these proposed rules of construction. The final rule retains these provisions but renumbers them as paragraphs (ii) and (iii) of §§ 35.108(a)(2) and 36.105(a)(2) and replaces the reference to "covered entity" in the title III regulatory text with "public accommodation."

The Department has added a third rule of construction at the beginning of §§ 35.108(a)(2) and 36.105(a)(2), numbered §§ 35.108(a)(2)(i) and 36.105(a)(2)(i). Closely tracking the amended statutory language, these provisions state that "[t]he definition of disability shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA." See 42 U.S.C. 12102(4)(A). This principle is referenced in other portions of the final rule, but the Department believes it is important to include here underscore Congress's intent that it be applied throughout the determination of whether an individual falls within the ADA definition of "disability."

## Sections 35.108(b) and 36.105(b)—Physical or Mental Impairment

The ADA Amendments Act did not change the meaning of the term "physical or mental impairment." Thus, in the NPRM, the Department proposed only minor modifications to the general regulatory definitions for this term at §§ 35.108(b)(1)(i) and 36.105(b)(1)(i) by adding examples of two additional body systems—the immune system and the circulatory system—that may be affected by a physical impairment.

In addition, the Department proposed adding "dyslexia" to §§ 35.108(b)(2) and 36.105(b)(2) as an example of a specific learning disability that falls within the meaning of the phrase "physical or mental impairment." Although dyslexia is a specific diagnosable learning disability that causes difficulties in reading, unrelated to intelligence and education, the Department became aware that some covered entities mistakenly believe that dyslexia is not a clinically diagnosable impairment. Therefore, the Department sought public comment regarding its proposed inclusion of a reference to dyslexia in these sections.

The Department received a significant number of comments in response to this proposal. Many commenters supported inclusion of the reference to dyslexia. Some of these commenters also asked the Department to include other examples of specific learning disabilities such as dysgraphia<sup>[1]</sup> and dyscalculia.<sup>[2]</sup> Several commenters remarked that as "research and practice bear out, dyslexia is just one of the specific learning disabilities that arise from neurological differences in brain structure and function and affect a person's ability to receive, store, process, retrieve or communicate information." These commenters identified the most common specific learning disabilities as: "Dyslexia, dysgraphia, dyscalculia, auditory processing disorder, visual processing disorder and non-verbal learning disabilities," and recommended that the Department rephrase its reference to specific learning disabilities to make clear that there are many other specific learning disabilities besides dyslexia. The Department has considered all of these comments and has decided to use the phrase "dyslexia and other specific learning disabilities" in the final rule.

<sup>[2]</sup> Dyscalculia is a learning disability that negatively affects the processing and learning of numerical information.

<sup>[1]</sup> Dysgraphia is a learning disability that negatively affects the ability to write.

Another commenter asked the Department to add a specific definition of dyslexia to the regulatory text itself. The Department declines to do so as it does not give definitions for any other physical or mental impairment in the regulations.

Other commenters recommended that the Department add ADHD to the list of examples of “physical or mental impairments” in §§ 35.108(b)(2) and 36.105(b)(2).<sup>[3]</sup> Some commenters stated that ADHD, which is not a specific learning disability, is a very commonly diagnosed impairment that is not always well understood. These commenters expressed concern that excluding ADHD from the list of physical and mental impairments could be construed to mean that ADHD is less likely to support an assertion of disability as compared to other impairments. On consideration, the Department agrees that, due to the prevalence of ADHD but lack of public understanding of the condition, inclusion of ADHD among the examples set forth in §§ 35.108(b)(2) and 36.105(b)(2) will provide appropriate and helpful guidance to the public.

Other commenters asked the Department to include arthritis, neuropathy, and other examples of physical or mental impairments that could substantially impair a major life activity. The Department declines to add any other examples because, while it notes the value in clarifying the existence of impairments such as ADHD, it also recognizes that the regulation need not elaborate an inclusive list of all impairments, particularly those that are very prevalent, such as arthritis, or those that may be symptomatic of other underlying impairments already referenced in the list, such as neuropathy, which may be caused by cancer or diabetes. The list is merely illustrative and not exhaustive. The regulations clearly state that the phrase “physical or mental impairment” includes, but is not limited to” the examples provided. No negative implications should be drawn from the omission of any specific impairment in §§ 35.108(b) and 36.105(b).

The Department notes that it is important to distinguish between conditions that are impairments and physical, environmental, cultural, or economic characteristics that are not impairments. The definition of the term “impairment” does not include physical characteristics such as eye color, hair color, or left-handedness, or height, weight, or muscle tone that are within “normal” range. Moreover, conditions that are not themselves physiological disorders, such as pregnancy, are not impairments. However, even if an underlying condition or characteristic is not itself a physical or mental impairment, it may give rise to a physical or mental impairment that substantially limits a major life activity. In such a case, an individual would be able to establish coverage under the ADA. For example, while pregnancy itself is not an impairment, a pregnancy-related impairment that substantially limits a major life activity will constitute a disability under the first prong of the definition.<sup>[4]</sup> Major life activities that might be substantially limited by pregnancy-related impairments could include walking, standing, and lifting, as well as major bodily functions such as the musculoskeletal, neurological, cardiovascular, circulatory, endocrine, and reproductive functions. Alternatively, a pregnancy-related impairment may constitute a “record of” a substantially limiting impairment, or may be covered under the “regarded as” prong if it is the basis for a prohibited action and is not both “transitory and minor.”

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<sup>[3]</sup> The Department is using the term ADHD in the same manner as it is currently used in the Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition (DSM-5), to refer to three different presentations of symptoms: Predominantly inattentive (which was previously known as “attention deficit disorder); predominantly hyperactive or impulsive; or a combined presentation of inattention and hyperactivity-impulsivity. The DSM-5 is the most recent edition of a widely-used manual designed to assist clinicians and researchers in assessing mental disorders. See *Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition DSM-5*, American Psychiatric Association, at 59-66 (2013).

## Sections 35.108(c) and 36.105(c)—Major Life Activities

Prior to the passage of the ADA Amendments Act, the ADA did not define “major life activities,” leaving delineation of illustrative examples to agency regulations. Paragraph 2 of the definition of “disability” in the Department’s current title II and title III regulations at 28 CFR 35.104 and 36.104 states that “major life activities” means functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

The ADA Amendments Act significantly expanded the range of major life activities by directing that “major” be interpreted in a more expansive fashion, by adding a significant new category of major life activities, and by providing non-exhaustive lists of examples of major life activities. The amended statute’s first list of major life activities includes, but is not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 U.S.C. 12102(2)(A). The ADA Amendments Act also broadened the definition of “major life activity” to include physical or mental impairments that substantially limit the operation of a “major bodily function,” which include, but are not limited to, the “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. 12102(2)(B). These expanded lists of examples of major life activities reflect Congress’s directive to expand the meaning of the term “major” in response to court decisions that interpreted the term more narrowly than Congress intended. See Public Law 110-25, sec. 3 (b)(4).

## Examples of Major Life Activities, Other Than the Operations of a Major Bodily Function

In the NPRM, at §§ 35.108(c) and 36.105(c), the Department proposed revisions of the title II and title III lists of examples of major life activities (other than the operations of a major bodily function) to incorporate all of the statutory examples, as well as to provide additional examples included in the EEOC title I final regulation—reaching, sitting, and interacting with others. See 29 CFR 1630.2(i)(1)(i).

A number of commenters representing persons with disabilities or the elderly recommended that the Department add a wide variety of other activities to this first list. Some commenters asked the Department to include references to test taking, writing, typing, keyboarding, or executive function.<sup>[4]</sup> Several commenters asked the Department to include other activities as well, such as the ability to engage in sexual activity, perform mathematical calculations, travel, or drive. One commenter asked the Department to recognize that, depending upon where people live, other life activities may fall within the category of major life activities. This commenter asserted, for example, that tending livestock or operating farm equipment can be a major life activity in a farming or ranching community, and that maintaining septic, well or water systems, or gardening, composting, or hunting may be a major life activity in a rural community.

<sup>[4]</sup> Pregnancy-related impairments may include, but are not limited to: Disorders of the uterus and cervix, such as insufficient cervix or uterine fibroids; and pregnancy-related anemia, sciatica, carpal tunnel syndrome, gestational diabetes, nausea, abnormal heart rhythms, limited circulation, or depression. See EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, EEOC Notice 915.003, June 25, 2015, available at [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm) (last visited Feb. 3, 2016).

On consideration of the legislative history and the relevant public comments, the Department decided to include "writing" as an additional example in its non-exhaustive list of examples of major life activities in the final rule. The Department notes Congress repeatedly stressed that writing is one of the major life activities that is often affected by a covered learning disability. See, e.g., 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers); H.R. Rep. No. 110-730 pt. 1, at 10-11 (2008).

Other than "writing," the Department declines to add additional examples of major life activities to these provisions in the final rule. This list is illustrative, and the Department believes that it is neither necessary nor possible to list every major life activity. Moreover, the Department notes that many of the commenters' suggested inclusions implicate life activities already included on the list. For example, although, as commenters pointed out, some courts have concluded that test taking is a major life activity,<sup>[6]</sup> the Department notes that one or more already-included major life activities—such as reading, writing, concentrating, or thinking, among others—will virtually always be implicated in test taking. Similarly, activities such as operating farm equipment, or maintaining a septic or well system, implicate already-listed major life activities such as reaching, lifting, bending, walking, standing, and performing manual tasks.

The commenters' suggested additions also implicate the operations of various bodily systems that may already be recognized as major life activities. See discussion of §§ 35.108(c)(1)(ii) and 36.105(c)(1)(ii), below. For example, it is the Department's view that individuals who have cognitive or other impairments that affect the range of abilities that are often described as part of "executive function" will likely be able to assert that they have impairments that substantially limit brain function, which is one of the major bodily functions listed among the examples of major life activities.

## Examples of Major Life Activities—Operations of a Major Bodily Function

In the NPRM, the Department proposed revising the regulatory definitions of disability at §§ 35.108(c)(1)(ii) and 36.105(c)(1)(ii) to make clear that the operations of major bodily functions are major life activities, and to include a non-exhaustive list of examples of major bodily functions, consistent with the language of the ADA as amended. Because the statutory list is non-exhaustive, the Department also proposed further expanding the list to include the

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<sup>[5]</sup> "Executive function" is an umbrella term that has been described as referring to "a constellation of cognitive abilities that include the ability to plan, organize, and sequence tasks and manage multiple tasks simultaneously." See, e.g. National Institute of Neurological Disorders and Stroke, *Domain Specific Tasks of Executive Functions*, available at [grants.nih.gov/grants/guide/notice-files/NOT-NS-04-012.html](http://grants.nih.gov/grants/guide/notice-files/NOT-NS-04-012.html) (last visited Feb. 3, 2016).

<sup>[6]</sup> In *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1117 (S.D.N.Y. 1997), *aff'd in part and vacated in part*, 156 F.3d 321 (2d Cir. 1998), *cert. granted, judgment vacated on other grounds*, 527 U.S. 1031 (1999), and *aff'd in part, vacated in part*, 226 F.3d 69 (2d Cir. 2000), then-Judge Sotomayor stated, "[I]n the modern era, where test-taking begins in the first grade, and standardized tests are a regular and often life-altering occurrence thereafter, both in school and at work, I find test-taking is within the ambit of 'major life activity.' See also *Rawdin v. American Bd. of Pediatrics*, 985 F. Supp. 2d 636 (E.D. Pa. 2013), *aff'd. on other grounds*, 2014 U.S. App. LEXIS 17002 (3d Cir. Sept. 3, 2014).

following examples of major bodily functions: The functions of the special sense organs and skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal systems. These six major bodily functions also are specified in the EEOC title I final regulation. 29 CFR 1630.2(i)(1)(i).

One commenter objected to the Department's inclusion of additional examples of major life activities in both these lists, suggesting that the Department include only those activities and conditions specifically set forth in the ADA as amended. The Department believes that providing other examples of major life activities, including major bodily functions, is within the Attorney General's authority to both interpret titles II and III of the ADA and promulgate implementing regulations and that these examples provide helpful guidance to the public. Therefore, the Department declines to limit its lists of major life activities to those specified in the statute. Further, the Department notes that even the expanded lists of major life activities and major bodily functions are illustrative and non-exhaustive. The absence of a particular life activity or bodily function from the list should not create a negative implication as to whether such activity or function constitutes a major life activity under the statute or the implementing regulation.

## Rules of Construction for Major Life Activities

In the NPRM, proposed §§ 35.108(c)(2) and 36.105(c)(2) set out two specific principles applicable to major life activities: “[i]n determining other examples of major life activities, the term ‘major’ shall not be interpreted strictly to create a demanding standard for disability,” and “[w]hether an activity is a ‘major life activity’ is not determined by reference to whether it is of ‘central importance to daily life.’” The proposed language furthered a main purpose of the ADA Amendments Act—to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that (1) strictly interpreted the terms “substantially” and “major” in the definition of “disability” to create a demanding standard for qualifying as disabled under the ADA, and that (2) required an individual to have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives to be considered as “substantially limited” in performing a major life activity under the ADA. Public Law 110-325, sec. 2(b)(4).

The Department did not receive any comments objecting to its proposed language. In the final rule, the Department retained these principles but has numbered each principle individually and deemed them “rules of construction” because they are intended to inform the determination of whether a particular activity is a major life activity.

## Sections 35.108(d)(1) and 36.105(d)(1)—Substantially Limits

**Overview.** The ADA as amended directs that the term “substantially limits” shall be “interpreted consistently with the findings and purposes of the ADA Amendments Act.” 42 U.S.C. 12102(4)(B). See also Findings and Purposes of the ADA Amendments Act, Public Law 110-325, sec. 2(a)-(b). In the NPRM, the Department proposed to add nine rules of construction at §§ 35.108(d) and 36.105(d) clarifying how to interpret the meaning of “substantially limits” when determining whether an individual’s impairment substantially limits a major life activity. These rules of construction are based on the requirements of the ADA as amended and the clear mandates of the legislative history. Due to the insertion of the rules of construction, these provisions are renumbered in the final rule.

## Sections 35.108(d)(1)(i) and 36.105(d)(1)(i)—Broad Construction, Not a Demanding Standard

In accordance with Congress's overarching directive to construe the term "disability" broadly, see 42 U.S.C. 12102(4)(A), the Department, in its NPRM, proposed §§ 35.108(d)(1)(i) and 36.105(d)(1)(i), which state: "The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA." These provisions are also rooted in the Findings and Purposes of the ADA Amendments Act, in which Congress instructed that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." See Public Law 110-325, sec. 2(b)(1), (4)-(5).

Several commenters on these provisions supported the Department's proposal to include these rules of construction, noting that they were in keeping with both the statutory language and Congress's intent to broaden the definition of "disability" and restore expansive protection under the ADA. Some of these commenters stated that, even after the passage of the ADA Amendments Act, some covered entities continued to apply a narrow definition of "disability."

Other commenters expressed concerns that the proposed language would undermine congressional intent by weakening the meaning of the word "substantial." One of these commenters asked the Department to define the term "substantially limited" to include an element of materiality, while other commenters objected to the breadth of these provisions and argued that it would make the pool of people who might claim disabilities too large, allowing those without substantial limitations to be afforded protections under the law. Another commenter expressed concern about the application of the regulatory language to the diagnosis of learning disabilities and ADHD.

The Department considered all of these comments and declines to provide a definition of the term "substantially limits" or make any other changes to these provisions in the final rule. The Department notes that Congress considered and expressly rejected including language defining the term "substantially limits": "We have concluded that adopting a new, undefined term that is subject to widely disparate meanings is not the best way to achieve the goal of ensuring consistent and appropriately broad coverage under this Act. The resulting need for further judicial scrutiny and construction will not help move the focus from the threshold issue of disability to the primary issue of discrimination." 154 Cong. Rec. S8441. (daily ed. Sept. 16, 2008) (Statement of the Managers).

The Department believes that the nine rules of construction interpreting the term "substantially limits" provide ample guidance on determining whether an impairment substantially limits a major life activity and are sufficient to ensure that covered entities will be able to understand and apply Congress's intentions with respect to the breadth of the definition of "disability."

Moreover, the commenters' arguments that these provisions would undermine congressional intent are unsupported. To the contrary, Congress clearly intended the ADA Amendments Act to expand coverage: "The managers have introduced the ADA Amendments Act of 2008 to restore the proper balance and application of the ADA by clarifying and broadening the definition of disability, and to increase eligibility for the protections of the ADA. It is our expectation that because this bill makes the definition of disability more generous, some people who were not covered before will now be covered." 154 Cong. Rec. S8441 (daily ed. Sept. 16, 2008) (Statement of the Managers).

The Department has also considered the comments expressed about the interplay between the proposed regulatory language and the diagnosis of learning disabilities and ADHD disorders. The Department believes that the revised definition of "disability," including, in particular, the provisions construing "substantially limits," strikes the appropriate balance to effectuate Congress's intent when it passed the ADA Amendments Act, and will not modify its regulatory language in response to these comments.

## Sections 35.108(d)(1)(ii) and 36.105(d)(1)(ii)—Primary Object of ADA Cases

In the ADA Amendments Act, Congress directed that rules of construction should ensure that “substantially limits” is construed in accordance with the findings and purposes of the statute. See 42 U.S.C. 12102(4)(B). One of the purposes of the Act was to convey that “the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with the obligations and to convey that the question of whether an individuals’ impairment is a disability should not demand extensive analysis.” Public Law 110-325, sec. 2(b)(5). The legislative history clarifies that: “Through this broad mandate [of the ADA], Congress sought to protect anyone who is treated less favorably because of a current, past, or perceived disability. Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage. Nevertheless, as the courts began interpreting and applying the definition of disability strictly, individuals have been excluded from the protections that the ADA affords because they are unable to meet the demanding judicially imposed standard for qualifying as disabled.”). H.R. Rep. No. 110-730, pt. 2, at 5 (2008) (House Committee on the Judiciary).

In keeping with Congress’s intent and the language of the ADA Amendments Act, the rules of construction at proposed §§ 35.108(d)(1)(iii) and 36.105(d)(1)(iii) make clear that the primary object of attention in ADA cases should be whether public or other covered entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual’s impairment substantially limits a major life activity. In particular, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

A number of commenters expressed support for these rules of construction, noting that they reinforced Congress’s intent in ensuring that the primary focus will be on compliance. Several commenters objected to the use of the word “cases” in these provisions, stating that it lacked clarity. The word “cases” tracks the language of the ADA Amendments Act and the Department declines to change the term.

A few commenters objected to these provisions because they believed that the language would be used to supersede or otherwise change the required analysis of requests for reasonable modifications or testing accommodations. See 28 CFR 35.130(b)(7), 36.302, 36.309. The Department disagrees with these commenters. These rules of construction relate only to the determination of coverage under the ADA. They do not change the analysis of whether a discriminatory act has taken place, including the determination as to whether an individual is entitled to a reasonable modification or testing accommodation. See discussion of §§ 35.108(d)(1)(vii) and 36.105(d)(1)(vii) below.

The Department retained the language of these rules of construction in the final rule except that in the title III regulatory text it has changed the reference from “covered entity” to “public accommodation.” The Department also renumbered these provisions as §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii).

## Sections 35.108(d)(1)(iii) and 36.105(d)(1)(iii)—Impairment Need Not Substantially Limit More Than One Major Life Activity

Proposed §§ 35.108(d)(1)(viii) and 36.105(d)(1)(viii) stated that “[a]n impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.” See 42 U.S.C. 12102(4)(C). This language reflected the statutory intent to reject court decisions that had required individuals to show that an impairment substantially limits more than one major life activity. See 154 Cong. Rec. S8841-44 (daily ed. Sept. 16, 2008) (Statement of

the Managers). Applying this principle, for example, an individual seeking to establish coverage under the ADA need not show a substantial limitation in the ability to learn if that individual is substantially limited in another major life activity, such as walking, or the functioning of the nervous or endocrine systems. The proposed rule also was intended to clarify that the ability to perform one or more particular tasks within a broad category of activities does not preclude coverage under the ADA. See H.R. Rep. No. 110-730, pt. 2, at 19 & n.52 (2008) (House Committee on the Judiciary). For instance, an individual with cerebral palsy could have a capacity to perform certain manual tasks yet nonetheless show a substantial limitation in the ability to perform a “broad range” of manual tasks.

The Department received one comment specifically supporting this provision and none opposing it. The Department is retaining this language in the final rule although it is renumbered and is found at §§ 35.108(d)(1)(iii) and 36.105(d)(1)(iii).

## Sections 35.108(d)(1)(iv) and 36.105(d)(1)(iv)—Impairments That Are Episodic or in Remission

The ADA as amended provides that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”

- 42 U.S.C. 12102(4)(D). In the NPRM, the Department proposed §§ 35.108(d)(1)(vii) and 36.105(d)(1)(vii) to directly incorporate this language. These provisions are intended to reject the reasoning of court decisions concluding that certain individuals with certain conditions—such as epilepsy or post traumatic stress disorder—were not protected by the ADA because their conditions were episodic or intermittent. The legislative history provides that “[t]his . . . rule of construction thus rejects the reasoning of the courts in cases like *Todd v. Academy Corp.*

[57 F. Supp. 2d 448, 453 (S.D. Tex. 1999)] where the court found that the plaintiff's epilepsy, which resulted in short seizures during which the plaintiff was unable to speak and experienced tremors, was not sufficiently limiting, at least in part because those seizures occurred episodically. It similarly rejects the results reached in cases [such as *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 182-83 (D.N.H. 2002)] where the courts have discounted the impact of an impairment [such as cancer] that may be in remission as too short-lived to be substantially limiting. It is thus expected that individuals with impairments that are episodic or in remission (e.g., epilepsy, multiple sclerosis, cancer) will be able to establish coverage if, when active, the impairment or the manner in which it manifests (e.g., seizures) substantially limits a major life activity.” H.R. Rep. No. 110-730, pt. 2, at 19-20 (2008) (House Committee on the Judiciary).

Some examples of impairments that may be episodic include hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia. The fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity. For example, a person with post-traumatic stress disorder who experiences intermittent flashbacks to traumatic events is substantially limited in brain function and thinking.

The Department received three comments in response to these provisions. Two commenters supported this provision and one commenter questioned about how school systems should provide reasonable modifications to students with disabilities that are episodic or in remission. As

discussed elsewhere in this guidance, the determination of what is an appropriate modification is separate and distinct from the determination of whether an individual is covered by the ADA, and the Department will not modify its regulatory language in response to this comment.

## Sections 35.108(d)(1)(v) and 36.105(d)(1)(v)—Comparisons to Most People in the Population, and Impairment Need Not Prevent or Significantly or Severely Restrict a Major Life Activity

In the legislative history of the ADA Amendments Act, Congress explicitly recognized that it had always intended that determinations of whether an impairment substantially limits a major life activity should be based on a comparison to most people in the population. The Senate Managers Report approvingly referenced the discussion of this requirement in the committee report from 1989. See 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers) (citing S. Rep. No. 101-116, at 23 (1989)). The preamble to the Department's 1990 title II and title III regulations also referenced that the impact of an individual's impairment should be based on a comparison to most people. See 56 FR 35694, 35699 (July 26, 1991).

Consistent with its longstanding intent, Congress directed, in the ADA Amendments Act, that disability determinations “should not demand extensive analysis” and that impairments do not need to rise to the level of “prevent[ing] or severely restrict[ing] the individual from doing activities that are of central importance to most people's daily lives.” See Public Law 110-325, sec. 2(b)(4)-(5). In giving this direction, Congress sought to correct the standard that courts were applying to determinations of disability after *Toyota*, which had created “a situation in which physical or mental impairments that would previously have been found to constitute disabilities are not considered disabilities under the Supreme Court's narrower standard.” 154 Cong. Rec. S8840-8841 (daily ed. Sept. 16, 2008) (Statement of the Managers). The ADA Amendments Act thus abrogates *Toyota*'s holding by mandating that “substantially limited” must no longer create “an inappropriately high level of limitation.” See Public Law 110-325, sec. 2(b)(4)-(5) and 42 U.S.C. 12102(4)(B). For example, an individual with carpal tunnel syndrome, a physical impairment, can demonstrate that the impairment substantially limits the major life activity of writing even if the impairment does not prevent or severely restrict the individual from writing.

Accordingly, proposed §§ 35.108(d)(1)(ii) and 36.105(d)(1)(ii) state that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. However, an impairment does not need to prevent, or significantly or severely restrict, an individual from performing a major life activity in order to be substantially limiting. The proposed language in the NPRM was rooted in the corrective nature of the ADA Amendments Act and its explicit rejection of the strict standards imposed under *Toyota* and its progeny. See Public Law 110-325, sec. 2(b)(4).

The Department received several comments on these provisions, none of which recommended modification of the regulatory language. A few commenters raised concerns that are further addressed in the “Condition, manner, or duration” section below, regarding the Department's inclusion in the NPRM preamble of a reference to possibly using similarly situated individuals as the basis of comparison. The Department has removed this discussion and clarified that it does not endorse reliance on similarly situated individuals to demonstrate substantial limitations. For example, the Department recognizes that when determining whether an elderly person is substantially limited in a major life activity, the proper comparison is most people in the general

population, and not similarly situated elderly individuals. Similarly, someone with ADHD should be compared to most people in the general population, most of whom do not have ADHD. Other commenters expressed interest in the possibility that, in some cases, evidence to support an assertion that someone has an impairment might simultaneously be used to demonstrate that the impairment is substantially limiting. These commenters approvingly referenced the EEOC's interpretive guidance for its ADA Amendments Act regulation, which provided an example of an individual with a learning disability. See 76 FR 16978, 17009 (Mar. 25, 2011). In that example, evidence gathered to demonstrate the impairment of a learning disability showed a discrepancy between the person's age, measured intelligence, and education and that person's actual versus expected achievement. The EEOC noted that such individuals also likely would be able to demonstrate substantial limitations caused by that impairment to the major life activities of learning, reading, or thinking, when compared to most people in the general population, especially when the ameliorative effects of mitigating measures were set aside. The Department concurs with this view.

Finally, the Department added an explicit statement recognizing that not every impairment will constitute a disability within the meaning of the section. This language echoes the Senate Statement of Managers, which clarified that: “[N]ot every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA. An impairment that does not substantially limit a major life activity is not a disability under this prong.” 154 Cong. Rec. S8841 (daily ed. Sept. 16, 2008) (Statement of the Managers).

## **Sections 35.108(d)(1)(vi) and 36.105(d)(1)(vi)—“Substantially Limits” Shall Be Interpreted To Require a Lesser Degree of Functional Limitation Than That Required Prior to the ADA Amendments Act**

In the NPRM, proposed §§ 35.108(d)(1)(iv) and 36.105(d)(1)(iv) state that determining whether an impairment substantially limits a major life activity requires an individualized assessment. But, the interpretation and application of the term “substantially limits” for this assessment requires a lower degree of functional limitation than the standard applied prior to the ADA Amendments Act.

These rules of construction reflect Congress's concern that prior to the adoption of the ADA Amendments Act, courts were using too high a standard to determine whether an impairment substantially limited a major life activity. See Public Law 110-325, sec. 2(b)(4)-(5); see also 154 Cong. Rec. S8841 (daily ed. Sept. 16, 2008) (Statement of the Managers) (“This bill lowers the standard for determining whether an impairment constitute[s] a disability and reaffirms the intent of Congress that the definition of disability in the ADA is to be interpreted broadly and inclusively.”).

The Department received no comments on these provisions. The text of these provisions is unchanged in the final rule, although they have been renumbered as §§ 35.108(d)(1)(vi) and 36.105(d)(1)(vi).

## **Sections §§ 35.108(d)(1)(vii) and 36.105(d)(1)(vii)—Comparison of Individual's Performance of Major Life Activity Usually Will Not Require Scientific, Medical, or Statistical Analysis**

In the NPRM, the Department proposed at §§ 35.108(d)(1)(v) and 36.105(d)(1)(v) rules of construction making clear that the comparison of an individual's performance of a major life activity to that of most people in the general population usually will not require scientific, medical, or statistical evidence. However, this rule is not intended to prohibit or limit the use of scientific, medical, or statistical evidence in making such a comparison where appropriate.

These rules of construction reflect Congress's rejection of the demanding standards of proof imposed upon individuals with disabilities who tried to assert coverage under the ADA prior to the adoption of the ADA Amendments Act. In passing the Act, Congress rejected the idea that the disability determination should be “an onerous burden for those seeking accommodations or modifications.” See 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). These rules make clear that in most cases, people with impairments will not need to present scientific, medical, or statistical evidence to support their assertion that an impairment is substantially limiting compared to most people in the general population. Instead, other types of evidence that are less onerous to collect, such as statements or affidavits of affected individuals, school records, or determinations of disability status under other statutes, should, in most cases, be considered adequate to establish that an impairment is substantially limiting. The Department's proposed language reflected Congress's intent to ensure that individuals with disabilities are not precluded from seeking protection under the ADA because of an overbroad, burdensome, and generally unnecessary requirement.

The Department received several comments in support of these provisions and a number of comments opposing all or part of them. One commenter representing individuals with disabilities expressed support for the proposed language, noting that “[m]any people with disabilities have limited resources and requiring them to hire an expert witness to confirm their disability would pose an insurmountable barrier that could prevent them from pursuing their ADA cases.”

Commenters representing testing entities objected to this language arguing that they needed scientific, medical, or statistical evidence in order to determine whether an individual has a learning disability or ADHD. These commenters argued that, unlike other disabilities, assessment of learning disabilities and ADHD require scientific, medical, or statistical evidence because such disabilities have no overt symptoms, cannot be readily observed, and lack medical or scientific verifiability. One commenter stated that the proposed language “favor[s] expedience over evidence-based guidance.”

In opposing these provisions, these commenters appear to conflate proof of the existence of an impairment with the analysis of how an impairment substantially limits a major life activity. These provisions address only how to evaluate whether an impairment substantially limits a major life activity, and the Department's proposed language appropriately reflects Congress's intent to ensure that individuals with disabilities are not precluded from seeking protection under the ADA because of overbroad, burdensome, and generally unnecessary evidentiary requirements. Moreover, the Department disagrees with the commenters' suggestion that an individual with ADHD or a specific learning disability can never demonstrate how the impairment substantially limits a major life activity without scientific, medical, or statistical evidence. Scientific, medical, or statistical evidence usually will not be necessary to determine whether an individual with a disability is substantially limited in a major life activity. However, as the rule notes, such evidence may be appropriate in some circumstances.

One commenter suggested that the words “where appropriate” be deleted from these provisions in the final rule out of concern that they may be used to preclude individuals with disabilities from proffering scientific or medical evidence in support of a claim of coverage under the ADA. The Department disagrees with the commenter’s reading of these provisions. Congress recognized that some people may choose to support their claim by presenting scientific or medical evidence and made clear that “plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting.” See 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). The language “where appropriate” allows for those circumstances where an individual chooses to present such evidence, but makes clear that in most cases presentation of such evidence shall not be necessary.

Finally, although the NPRM did not propose any changes with respect to the title III regulatory requirements applicable to the provision of testing accommodations at 28 CFR 36.309, one commenter requested revisions to § 36.309 to acknowledge the changes to regulatory language in the definition of “disability.” Another commenter noted that the proposed changes to the regulatory definition of “disability” warrant new agency guidance on how the ADA applies to requests for testing accommodations.

The Department does not consider it appropriate to include provisions related to testing accommodations in the definitional sections of the ADA regulations. The determination of disability, and thus coverage under the ADA, is governed by the statutory and regulatory definitions and the related rules of construction. Those provisions do not speak to what testing accommodations an individual with a disability is entitled to under the ADA nor to the related questions of what a testing entity may request or require from an individual with a disability who seeks testing accommodations. Testing entities’ substantive obligations are governed by 42 U.S.C. 12189 and the implementing regulation at 28 CFR 36.309. The implementing regulation clarifies that private entities offering covered examinations need to make sure that any request for required documentation is reasonable and limited to the need for the requested modification, accommodation, or auxiliary aid or service. Furthermore, when considering requests for modifications, accommodations, or auxiliary aids or services, the entity should give considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations or provided in response to an Individualized Education Program (IEP) provided under the IDEA or a plan describing services provided under section 504 of the Rehabilitation Act of 1973 (often referred as a Section 504 Plan).

Contrary to the commenters’ suggestions, there is no conflict between the regulation’s definitional provisions and title III’s testing accommodation provisions. The first addresses the core question of who is covered under the definition of “disability,” while the latter sets forth requirements related to documenting the need for particular testing accommodations. To the extent that testing entities are urging conflation of the analysis for establishing disability with that for determining required testing accommodations, such an approach would contradict the clear delineation in the statute between the determination of disability and the obligations that ensue.

Accordingly, in the final rule, the text of these provisions is largely unchanged, except that the provisions are renumbered as §§ 35.108(d)(1)(vii) and 36.108(d)(1)(vii), and the Department added “the presentation of,” in the second sentence, which was included in the corresponding provision of the EEOC final rule. See 29 CFR 1630.2(j)(1)(v).

## Sections 35.108(d)(1)(viii) and 36.105(d)(1)(viii)—Determination Made Without Regard to the Ameliorative Effects of Mitigating Measures

The ADA as amended expressly prohibits any consideration of the ameliorative effects of mitigating measures when determining whether an individual's impairment substantially limits a major life activity, except for the ameliorative effects of ordinary eyeglasses or contact lenses. 42 U.S.C. 12102(4)(E). The statute provides an illustrative, and non-exhaustive list of different types of mitigating measures. *Id.*

In the NPRM, the Department proposed §§ 35.108(d)(2)(vi) and 36.105(d)(2)(vi), which tracked the statutory language regarding consideration of mitigating measures. These provisions stated that the ameliorative effects of mitigating measures should not be considered when determining whether an impairment substantially limits a major life activity. However, the beneficial effects of ordinary eyeglasses or contact lenses should be considered when determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses refer to lenses that are intended to fully correct visual acuity or to eliminate refractive errors. Proposed §§ 35.108(d)(4) and 36.105(d)(4), discussed below, set forth examples of mitigating measures.

A number of commenters agreed with the Department's proposed language and no commenters objected. Some commenters, however, asked the Department to add language to these sections stating that, although the ameliorative effects of mitigating measures may not be considered in determining whether an individual has a covered disability, they may be considered in determining whether an individual is entitled to specific testing accommodations or reasonable modifications. The ADA Amendments Act revised the definition of “disability” and the Department agrees that the Act's prohibition on assessing the ameliorative effects of mitigating measures applies only to the determination of whether an individual meets the definition of “disability.” The Department declines to add the requested language, however, because it goes beyond the scope of this rulemaking by addressing ADA requirements that are not related to the definition of “disability.” These rules of construction do not apply to the requirements to provide reasonable modifications under §§ 35.130(b)(7) and 36.302 or testing accommodations under § 36.309 in the title III regulations. The Department disagrees that further clarification is needed at this point and declines to modify these provisions except that they are now renumbered as §§ 35.108(d)(1)(viii) and § 36.105(d)(1)(viii).

The Department notes that in applying these rules of construction, evidence showing that an impairment would be substantially limiting in the absence of the ameliorative effects of mitigating measures could include evidence of limitations that a person experienced prior to using a mitigating measure or evidence concerning the expected course of a particular disorder absent mitigating measures.

The determination of whether an individual's impairment substantially limits a major life activity is unaffected by an individual's choice to forgo mitigating measures. For individuals who do not use a mitigating measure (including, for example, medication or auxiliary aids and services that might alleviate the effects of an impairment), the availability of such measures has no bearing on whether the impairment substantially limits a major life activity. The limitations posed by the impairment on the individual and any negative (non-ameliorative) effects of mitigating measures will serve as the foundation for a determination of whether an impairment is substantially limiting. The origin of the impairment, whether its effects can be mitigated, and any ameliorative effects of mitigating measures that are employed may not be considered in determining if the impairment is substantially limiting.

## Sections 35.108(d)(1)(ix) and 36.105(d)(1)(ix)—Impairment That Lasts Less Than Six Months Can Still Be a Disability Under First Two Prongs of the Definition

In §§ 35.108(d)(1)(ix) and 36.105(d)(1)(ix), the NPRM proposed rules of construction noting that the six-month “transitory” part of the “transitory and minor” exception does not apply to the “actual disability” or “record of” prongs of the definition of “disability.” Even if an impairment may last or is expected to last six months or less, it can be substantially limiting.

The ADA as amended provides that the “regarded as” prong of the definition of “disability” does “not apply to impairments that are [both] transitory and minor.” 42 U.S.C. 12102(3)(B). “Transitory impairment” is defined as “an impairment with an actual or expected duration of six months or less.” *Id.* The statute does not define the term “minor.” Whether an impairment is both “transitory and minor” is a question of fact that is dependent upon individual circumstances. The ADA as amended contains no such provision with respect to the first two prongs of the definition of “disability”—“actual disability,” and “record of” disability. The application of the “transitory and minor” exception to the “regarded as” prong is addressed in §§ 35.108(f) and 36.105(f).

The Department received two comments on this proposed language. One commenter recommended that the Department delete this language and “replace it with language clarifying that if a condition cannot meet the lower threshold of impairment under the third prong, it cannot meet the higher threshold of a disability under the first and second prongs.” The Department declines to modify these provisions because the determination of whether an individual satisfies the requirements of a particular prong is not a comparative determination between the three means of demonstrating disability under the ADA. The Department believes that the suggested language would create confusion because there are significant differences between the first two prongs and the third prong. In addition, the Department believes its proposed language is in keeping with the ADA Amendments Act and the supporting legislative history.

The other commenter suggested that the Department add language to provide greater clarity with respect to the application of the transitory and minor exception to the “regarded as” prong. The Department does not believe that additional language should be added to these rules of construction, which relate only to whether there is a six-month test for the first two prongs of the definition. As discussed below, the Department has revised both the regulatory text at §§ 35.108(f) and 36.105(f) and its guidance on the application of the “transitory and minor” exception to the “regarded as” prong. See discussion below.

## Sections 35.108(d)(2) and 36.105(d)(2)—Predictable Assessments

In the NPRM, proposed §§ 35.108(d)(2) and 36.105(d)(2) set forth examples of impairments that should easily be found to substantially limit one or more major life activities. These provisions recognized that while there are no “per se” disabilities, for certain types of impairments the application of the various principles and rules of construction concerning the definition of “disability” to the individualized assessment would, in virtually all cases, result in the conclusion that the impairment substantially limits a major life activity. Thus, the necessary individualized assessment of coverage premised on these types of impairments should be particularly simple and straightforward. The purpose of the “predictable assessments” provisions is to simplify consideration of those disabilities that virtually always create substantial limitations to major life activities, thus satisfying the statute’s directive to create clear, consistent, and enforceable

standards and ensuring that the inquiry of “whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” See Public Law 110-325, sec. 2(b)(1), (5). The impairments identified in the predictable assessments provision are a non-exhaustive list of examples of the kinds of disabilities that meet these criteria and, with one exception, are consistent with the corresponding provision in the EEOC ADA Amendments Act rule. See 29 CFR 1630.2(j)(3)(iii).<sup>[7]</sup>

The Department believes that the predictable assessments provisions comport with the ADA Amendments Act’s emphasis on adopting a less burdensome and more expansive definition of “disability.” The provisions are rooted in the application of the statutory changes to the meaning and interpretation of the definition of “disability” contained in the ADA Amendments Act and flow from the rules of construction set forth in §§ 35.108(a)(2)(i), 36.105(a)(2)(i), 35.108(c)(2)(i) and (ii), 36.105(c)(2)(i) and (ii). These rules of construction and other specific provisions require the broad construction of the definition of “disability” in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. In addition, they lower the standard to be applied to “substantially limits,” making clear that an impairment need not prevent or significantly restrict an individual from performing a major life activity; clarify that major life activities include major bodily functions; elucidate that impairments that are episodic or in remission are disabilities if they would be substantially limiting when active; and incorporate the requirement that the ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) must be disregarded in assessing whether an individual has a disability.

Several organizations representing persons with disabilities and the elderly, constituting the majority of commenters on these provisions, supported the inclusion of the predictable assessments provisions. One commenter expressed strong support for the provision and recommended that it closely track the corresponding provision in the EEOC title I rule, while another noted its value in streamlining individual assessments. In contrast, some commenters from educational institutions and testing entities recommended the deletion of these provisions, expressing concern that it implies the existence of “per se” disabilities, contrary to congressional intent that each assertion of disability should be considered on a case-by-case basis. The Department does not believe that the predictable assessment provisions constitutes a “per se” list of disabilities and will retain it. These provisions highlight, through a non-exhaustive list, impairments that virtually always will be found to substantially limit one or more major life activities. Such impairments still warrant individualized assessments, but any such assessments should be especially simple and straightforward.

The legislative history of the ADA Amendments Act supports the Department’s approach in this area. In crafting the Act, Congress hewed to the ADA definition of “disability,” which was modeled on the definition of “disability” in the Rehabilitation Act, and indicated that it wanted courts to interpret the definition as it had originally been construed. See H.R. Rep. No. 110-730, pt. 2, at 6 (2008). Describing this goal, the legislative history states that courts had interpreted the Rehabilitation Act definition “broadly to include persons with a wide range of physical and mental impairments such as epilepsy, diabetes, multiple sclerosis, and intellectual and developmental disabilities . . . even where a mitigating measure—like medication or a hearing aid—might lessen their impact on the individual.” *Id.*; see also *id.* at 9 (referring to individuals with disabilities that had been covered under section 504 of the Rehabilitation Act and that Congress intended to include under the ADA—“people with serious

[7] In the NPRM, the Department proposed adding “traumatic brain injury” to the predictable assessments list.

health conditions like epilepsy, diabetes, cancer, cerebral palsy, multiple sclerosis, intellectual and developmental disabilities”); *id.* at 6, n.6 (citing cases also finding that cerebral palsy, hearing impairments, intellectual disabilities, heart disease, and vision in only one eye were disabilities under the Rehabilitation Act); *id.* at 10 (citing testimony from Rep. Steny H. Hoyer, one of the original lead sponsors of the ADA in 1990, stating that “[w]e could not have fathomed that people with diabetes, epilepsy, heart conditions, cancer, mental illnesses and other disabilities would have their ADA claims denied because they would be considered too functional to meet the definition of disability”); 2008 Senate Statement of Managers at 3 (explaining that “we [we]re faced with a situation in which physical or mental impairments that would previously have been found to constitute disabilities [under the Rehabilitation Act] [we]re not considered disabilities” and citing individuals with impairments such as amputation, intellectual disabilities, epilepsy, multiple sclerosis, diabetes, muscular dystrophy, and cancer as examples).

Some commenters asked the Department to add certain impairments to the predictable assessments list, while others asked the Department to remove certain impairments. Commenters representing educational and testing institutions urged that, if the Department did not delete the predictable assessment provisions, then the list should be modified to remove any impairments that are not obvious or visible to third parties and those for which functional limitations can change over time. One commenter cited to a pre-ADA Amendments Act reasonable accommodations case, which included language regarding the uncertainty facing employers in determining appropriate reasonable accommodations when mental impairments often are not obvious and apparent to employers. See *Wallin v. Minnesota Dep’t of Corrections*, 153 F.3d 681, 689 (8th Cir. 1998). This commenter suggested that certain impairments, including autism, depression, post-traumatic stress disorder, and obsessive-compulsive disorder, should not be deemed predictable assessments because they are not immediately apparent to third parties. The Department disagrees with this commenter, and believes that it is appropriate to include these disabilities on the list of predictable assessments. Many disabilities are less obvious or may be invisible, such as cancer, diabetes, HIV infection, schizophrenia, intellectual disabilities, and traumatic brain injury, as well as those identified by the commenter. The likelihood that an impairment will substantially limit one or more major life activities is unrelated to whether or not the disability is immediately apparent to an outside observer. Therefore, the Department will retain the examples that involve less apparent disabilities on the list of predictable assessments.

The Department believes that the list accurately illustrates impairments that virtually always will result in a substantial limitation of one or more major life activities. The Department recognizes that impairments are not always static and can result in different degrees of functional limitation at different times, particularly when mitigating measures are used. However, the ADA as amended anticipates variation in the extent to which impairments affect major life activities, clarifying that impairments that are episodic or in remission nonetheless are disabilities if they would be substantially limiting when active and requiring the consideration of disabilities without regard to ameliorative mitigating measures. The Department does not believe that limiting the scope of its provisions addressing predictable assessments only to those disabilities that would never vary in functional limitation would be appropriate.

Other commenters speaking as individuals or representing persons with disabilities endorsed the inclusion of some impairments already on the list, including traumatic brain injury, sought the inclusion of additional impairments, requested revisions to some descriptions of impairments, or asked for changes to the examples of major life activities linked to specific impairments.

Several commenters requested the expansion of the predictable assessments list, in particular to add specific learning disabilities. Some commenters pointed to the ADA Amendments Act's legislative history, which included Representative Stark's remarks that specific learning disabilities are "neurologically based impairments that substantially limit the way these individuals perform major life activities, like reading or learning, or the time it takes to perform such activities." 154 Cong. Rec. H8291 (daily ed. Sept. 17, 2008). Others recommended that some specific types of specific learning disabilities, including dyslexia, dyscalculia, dysgraphia, dyspraxia, and slowed processing speed should be referenced as predictable assessments. With respect to the major life activities affected by specific learning disabilities, commenters noted that specific learning disabilities are neurologically based and substantially limit learning, thinking, reading, communicating, and processing speed.

Similarly, commenters recommended the inclusion of ADHD, urging that it originates in the brain and affects executive function skills including organizing, planning, paying attention, regulating emotions, and self-monitoring. One commenter noted that if ADHD meets the criteria established in the DSM-5, then it would consistently meet the criteria to establish disability under the ADA. The same commenter noted that ADHD is brain based and affects the major life activity of executive function. Another commenter suggested that ADHD should be included and should be identified as limiting brain function, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Other commenters urged the inclusion of panic disorders, anxiety disorder, cognitive disorder, and post-concussive disorder. A number of commenters noted that the exclusion of impairments from the predictable assessments list could be seen as supporting an inference that the impairments that are not mentioned should not easily be found to be disabilities.

The Department determined that it will retain the language it proposed in the NPRM and will not add or remove any impairments from this list. As discussed above, the list is identical to the EEOC's predictable assessments list, at 29 CFR 1630.2(g)(3)(iii), except that the Department's NPRM added traumatic brain injury. The Department received support for including traumatic brain injury and did not receive any comments recommending the removal of traumatic brain injury from the list; thus, we are retaining it in this final rule.

The Department's decision to track the EEOC's list, with one minor exception, stems in part from our intent to satisfy the congressional mandate for "clear, strong, consistent, enforceable standards." A number of courts already have productively applied the EEOC's predictable assessments provision, and the Department believes that it will continue to serve as a useful, common-sense tool in promoting judicial efficiency. It is important to note, however, that the failure to include any impairment in the list of examples of predictable assessments does not indicate that that impairment should be subject to undue scrutiny.

Some commenters expressed concern about the major life activities that the Department attributed to particular impairments. Two commenters sought revision of the major life activities attributed to intellectual disabilities, suggesting that it would be more accurate to reference cognitive function and learning, instead of reading, learning, and problem solving. One commenter recommended attributing the major life activity of brain function to autism rather than learning, social interaction, and communicating. The Department determined that it will follow the EEOC's model and, with respect to both intellectual disabilities and autism, it will reference the major bodily function of brain function. By using the term "brain function" to describe the system affected by various mental impairments, the Department intends to capture functions such as the brain's ability to regulate thought processes and emotions.

The Department considers it important to reiterate that, just as the list of impairments in these sections is not comprehensive, the list of major bodily functions or other major life activities linked to those impairments are not exhaustive. The impairments identified in these sections, may affect a wide range of major bodily functions and other major life activities. The Department's specification of certain major life activities with respect to particular impairments simply provides one avenue by which a person might elect to demonstrate that he or she has a disability.

The Department recognizes that impairments listed in §§ 35.108(d)(2) and 36.105(d)(2) may substantially limit other major life activities in addition to those listed in the regulation. For example, diabetes may substantially limit major life activities including eating, sleeping, and thinking. Major depressive disorder may substantially limit major life activities such as thinking, concentrating, sleeping, and interacting with others. Multiple sclerosis may substantially limit major life activities such as walking, bending, and lifting.

One commenter noted that the NPRM did not track the EEOC's language with respect to the manner in which it identified a major bodily function that is substantially limited by epilepsy, muscular dystrophy, or multiple sclerosis in 29 CFR 1630.2(j)(3)(iii). While the EEOC listed each of these three impairments individually, noting in each case that the major bodily function affected is neurological function, at 29 CFR 1630.2(j)(3)(iii), the NPRM grouped the three impairments and noted that they affect neurological function. In order to clarify that each of the three impairments may manifest a substantial limitation of neurological function, the final rule incorporates "each" immediately following the list of the three impairments. Similarly, the Department added an "each" to §§ 35.108(d)(2)(iii)(K) and 36.105(d)(2)(iii)(K) to make clear that each of the listed impairments substantially limits brain function.

Some commenters representing testing entities and educational institutions sought the insertion of language in the predictable assessment provisions that would indicate that individuals found to have disabilities are not, by virtue of a determination that they have a covered disability, eligible for a testing accommodation or a reasonable modification. The Department agrees with these commenters that the determination of disability is a distinct determination separate from the determination of the need for a requested modification or a testing accommodation. The Department declines to add the language suggested by the commenters to §§ 35.108(d)(2) and 36.105(d)(2), however, because the requirements for reasonable modifications are addressed separately in §§ 35.130(b)(7) and 36.302 of the title II and III regulations and the requirements related to providing appropriate accommodations in testing and licensing are found at § 36.309.

## Sections 35.108(d)(3) and 36.105(d)(3)—Condition, Manner, or Duration

**Overview.** Proposed §§ 35.108(d)(3) and 36.105(d)(3), both titled "Condition, manner[,] and duration," addressed how evidence related to condition, manner, or duration may be used to show how impairments substantially limit major life activities. These principles were first addressed in the preamble to the 1991 rule. At that time, the Department noted that "[a] person is considered an individual with a disability . . . when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." 56 FR 35544, 35549 (July 26, 1991); see also S. Rep. No. 101-116, at 23 (1989).

These concepts were affirmed by Congress in the legislative history to the ADA Amendments Act: "We particularly believe that this test, which articulated an analysis that considered whether a person's activities are limited in condition, duration and manner, is a useful one. We reiterate that using the correct

standard—one that is lower than the strict or demanding standard created by the Supreme Court in *Toyota*—will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations or modifications. At the same time, plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting.” 154 Cong. Rec. S8346 (Sept. 11, 2008). Noting its continued reliance on the functional approach to defining disability, Congress expressed its belief that requiring consistency with the findings and purposes of the ADA Amendments Act would “establish[ ] an appropriate functionality test for determining whether an individual has a disability.” *Id.* While condition, manner, and duration are not required factors that must be considered, the regulations clarify that these are the types of factors that may be considered in appropriate cases. To the extent that such factors may be useful or relevant to show a substantial limitation in a particular fact pattern, some or all of them (and related facts) may be considered, but evidence relating to each of these factors often will not be necessary to establish coverage.

In the NPRM, proposed §§ 35.108(d)(3)(i) and 35.105(d)(3)(i) noted that the rules of construction at §§ 35.108(d)(1) and 35.105(d)(1) should inform consideration of how individuals are substantially limited in major life activities. Sections 35.108(d)(3)(ii) and 36.105(d)(3)(ii) provided examples of how restrictions on condition, manner, or duration might be interpreted and also clarified that the negative or burdensome side effects of medication or other mitigating measures may be considered when determining whether an individual has a disability. In §§ 35.108(d)(3)(iii) and 36.105(d)(3)(iii), the proposed language set forth a requirement to focus on how a major life activity is substantially limited, rather than on the ultimate outcome a person with an impairment can achieve.

The Department received comments on the condition, manner, or duration provision from advocacy groups for individuals with disabilities, from academia, from education and testing entities, and from interested individuals. Several advocacy organizations for individuals with disabilities and private individuals noted that the section title's heading was inconsistent with the regulatory text and sought the replacement of the “and” in the section's title, “Condition, manner, and duration,” with an “or.” Commenters expressed concern that retaining the “and” in the heading title would be inconsistent with congressional intent and would incorrectly suggest that individuals are subject to a three-part test and must demonstrate that an impairment substantially limits a major life activity with respect to condition, manner, and duration. The Department agrees that the “and” used in the title of the proposed regulatory provision could lead to confusion and a misapplication of the law and has revised the title so it now reads “Condition, manner, or duration.” Consistent with the regulatory text, the revised heading makes clear that any one of the three descriptors—“condition,” “manner,” or “duration”—may aid in demonstrating that an impairment substantially limits a major life activity or a major bodily function.

## Condition, Manner, or Duration

In the NPRM, proposed §§ 35.108(d)(3)(i) and 36.105(d)(3)(i) noted that the application of the terms “condition” “manner,” or “duration” should at all times take into account the principles in § 35.108(d)(1) and § 36.105(d)(1), respectively, which referred to the rules of construction for “substantially limited.” The proposed regulatory text also included brief explanations of the meaning of the core terms, clarifying that in appropriate cases, it could be useful to consider, in comparison to most people in the general population, the conditions under which an individual performs a major life activity; the manner in which an individual performs a major life activity; or the time it takes an individual to perform a major life activity, or for which the individual can perform a major life activity.

Several disability rights advocacy groups and individuals supported the NPRM approach, with some referencing the value of pointing to the rules of construction and their relevance to condition, manner, or duration considerations. Some commenters noted that it was helpful to highlight congressional intent that the definition of "disability" should be broadly construed and not subject to extensive analysis. Another commenter recommended introducing a clarification that, while the limitation imposed by an impairment must be important, it does not need to rise to the level of severely or significantly restricting the ability to perform a major life activity. Some commenters sought additional guidance regarding the meaning of the terms "condition," "manner," and "duration" and recommended the addition of more illustrative examples.

In response to commenters' concerns, the Department has modified the regulatory text in §§ 35.108(d)(3)(i) and 36.105(d)(3)(i) to reference all of the rules of construction rather than only those pertaining to "substantially limited." The Department also added §§ 35.108(d)(3)(iv) and 36.105(d)(3)(iv), further discussed below, to clarify that the rules of construction will not always require analysis of condition, manner, or duration, particularly with respect to certain impairments, such as those referenced in paragraph (d)(2)(iii) (predictable assessments). With these changes, the Department believes that the final rule more accurately reflects congressional intent. The Department also believes that clarifying the application of the rules of construction to condition, manner, or duration will contribute to consistent interpretation of the definition of "disability" and reduce inadvertent reliance on older cases that incorporate demanding standards rejected by Congress in the ADA Amendments Act.

It is the Department's view that the rules of construction offer substantial guidance about how condition, manner, or duration must be interpreted so as to ensure the expansive coverage intended by Congress. Except for this clarification, the Department did not receive comments opposing the proposed regulatory text on condition, manner, or duration in §§ 35.108(d)(3)(i) and 36.105(d)(3)(i) and did not make any other changes to these provisions.

Some commenters objected to language in the preamble to the NPRM which suggested that there might be circumstances in which the consideration of condition, manner, or duration might not include comparisons to most people in the general population. On reconsideration, the Department recognizes that this discussion could create confusion about the requirements. The Department believes that condition, manner, or duration determinations should be drawn in contrast to most people in the general population, as is indicated in the related rules of construction, at §§ 35.108(d)(1)(v) and 36.105(d)(1)(v).

## Condition, Manner, or Duration Examples, Including Negative Effects of Mitigating Measures

Proposed §§ 35.108(d)(3)(ii) and 36.105(d)(3)(ii) set forth examples of the types of evidence that might demonstrate condition, manner, or duration limitations, including the way an impairment affects the operation of a major bodily function, the difficulty or effort required to perform a major life activity, the pain experienced when performing a major life activity, and the length of time it takes to perform a major life activity. These provisions also clarified that the non-ameliorative effects of mitigating measures may be taken into account to demonstrate the impact of an impairment on a major life activity. The Department's discussion in the NPRM preamble noted that such non-ameliorative effects could include negative side effects of medicine, burdens associated with following a particular treatment regimen, and complications that arise from surgery, among others. The preamble also provided further clarification of the possible applications of condition, manner, or duration analyses, along with several examples. Several commenters supported the proposed rule's incorporation of language and examples offering insight into

the varied ways that limitations on condition, manner, or duration could demonstrate substantial limitation. One commenter positively noted that the language regarding the “difficulty, effort, or time required to perform a major life activity” could prove extremely helpful to individuals asserting a need for testing accommodations, as evidence previously presented regarding these factors was deemed insufficient to demonstrate the existence of a disability. Some commenters requested the insertion of additional examples and explanation in the preamble about how condition, manner or duration principles could be applied under the new rules of construction. Another commenter sought guidance on the specific reference points that should be used when drawing comparisons with most people in the general population. The commenter offered the example of delays in developmental milestones as a possible referent in evaluating children with speech-language disorders, but noted a lack of guidance regarding comparable referents for adults. The commenter also noted that guidance is needed regarding what average or acceptable duration might be with respect to certain activities. An academic commenter expressed support for the Department's reference to individuals with learning impairments using certain self-mitigating measures, such as extra time to study or taking an examination in a different format, and the relevance of these measures to condition, manner, and duration.

The Department did not receive comments opposing the NPRM language on condition, manner, or duration in §§ 35.108(d)(3)(ii) and 36.105(d)(3)(ii) and is not making any changes to this language. The Department agrees that further explanation and examples as provided below regarding the concepts of condition, manner, or duration will help clarify how the ADA Amendments Act has expanded the definition of “disability.” An impairment may substantially limit the “condition” or “manner” in which a major life activity can be performed in a number of different ways. For example, the condition or manner in which a major life activity can be performed may refer to how an individual performs a major life activity; e.g., the condition or manner under which a person with an amputated hand performs manual tasks will likely be more cumbersome than the way that most people in the general population would perform the same tasks. Condition or manner also may describe how performance of a major life activity affects an individual with an impairment. For example, an individual whose impairment causes pain or fatigue that most people would not experience when performing that major life activity may be substantially limited. Thus, the condition or manner under which someone with coronary artery disease performs the major life activity of walking would be substantially limited if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without experiencing such effects. An individual with specific learning disabilities may need to approach reading or writing in a distinct manner or under different conditions than most people in the general population, possibly employing aids including verbalizing, visualizing, decoding or phonology, such that the effort required could support a determination that the individual is substantially limited in the major life activity of reading or writing.

Condition or manner may refer to the extent to which a major life activity, including a major bodily function, can be performed. In some cases, the condition or manner under which a major bodily function can be performed may be substantially limited when the impairment “causes the operation [of the bodily function] to over-produce or under-produce in some harmful fashion.” See H.R. Rep. No. 110-730, pt. 2, at 17 (2008). For example, the endocrine system of a person with type I diabetes does not produce sufficient insulin. For that reason, compared to most people in the general population, the impairment of diabetes substantially limits the major bodily functions of endocrine function and digestion. Traumatic brain injury substantially limits the condition or manner in which an individual's brain functions by impeding memory and causing headaches, confusion, or fatigue—each of which could constitute a substantial limitation on the major bodily function of brain function.

"Duration" refers to the length of time an individual can perform a major life activity or the length of time it takes an individual to perform a major life activity, as compared to most people in the general population. For example, a person whose back or leg impairment precludes him or her from standing for more than two hours without significant pain would be substantially limited in standing, because most people can stand for more than two hours without significant pain. However, "[a] person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort." See 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers) (quoting S. Rep. No. 101-116, at 23 (1989)). Some impairments, such as ADHD, may have two different types of impact on duration considerations. ADHD frequently affects both an ability to sustain focus for an extended period of time and the speed with which someone can process information. Each of these duration-related concerns could demonstrate that someone with ADHD, as compared to most people in the general population, takes longer to complete major life activities such as reading, writing, concentrating, or learning.

The Department reiterates that, because the limitations created by certain impairments are readily apparent, it would not be necessary in such cases to assess the negative side effects of a mitigating measure in determining that a particular impairment substantially limits a major life activity. For example, there likely would be no need to consider the burden that dialysis treatment imposes for someone with end-stage renal disease because the impairment would allow a simple and straightforward determination that the individual is substantially limited in kidney function.

One commenter representing people with disabilities asked the Department to recognize that, particularly with respect to learning disabilities, on some occasions the facts related to condition, manner, or duration necessary to reach a diagnosis of a learning disability also are sufficient to establish that the affected individual has a disability under the ADA. The Department agrees that the facts gathered to establish a diagnosis of an impairment may simultaneously satisfy the requirements for demonstrating limitations on condition, manner, or duration sufficient to show that the impairment constitutes a disability.

## Emphasis on Limitations Instead of Outcomes

In passing the ADA Amendments Act, Congress clarified that courts had misinterpreted the ADA definition of "disability" by, among other things, inappropriately emphasizing the capabilities of people with disabilities to achieve certain outcomes. See 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more of the major life activities of reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, speak, write, or learn compared to most people in the general population. As the House Education and Labor Committee Report emphasized:

[S]ome courts have found that students who have reached a high level of academic achievement are not to be considered individuals with disabilities under the ADA, as such individuals may have difficulty demonstrating substantial limitation in the major life activities of learning or reading relative to "most people." When considering the condition, manner or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. As such, the Committee rejects the findings in *Price v. National Board of Medical Examiners*, *Gonzales v. National Board of Medical Examiners*, and *Wong v. Regents of University of California*.

The Committee believes that the comparison of individuals with specific learning disabilities to "most people" is not problematic unto itself, but requires a careful analysis of the method and manner in which an individual's impairment limits a major life activity. For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g., dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life. The Committee expects that individuals with specific learning disabilities that substantially limit a major life activity will be better protected under the amended Act.

H.R. Rep. No. 110-730 pt. 1, at 10-11 (2008).

Sections 35.108(d)(3)(iii) and 36.105(d)(3)(iii) of the proposed rule reflected congressional intent and made clear that the outcome an individual with a disability is able to achieve is not determinative of whether an individual is substantially limited in a major life activity. Instead, an individual can demonstrate the extent to which an impairment affects the condition, manner, or duration in which the individual performs a major life activity, such that it constitutes a substantial limitation. The ultimate outcome of an individual's efforts should not undermine a claim of disability, even if the individual ultimately is able to achieve the same or similar result as someone without the impairment.

The Department received several comments on these provisions, with disability organizations and individuals supporting the inclusion of these provisions and some testing entities and an organization representing educational institutions opposing them. The opponents argued that academic performance and testing outcomes are objective evidence that contradict findings of disability and that covered entities must be able to focus on those outcomes in order to demonstrate whether an impairment has contributed to a substantial limitation. These commenters argued that the evidence frequently offered by those making claims of disability that demonstrate the time or effort required to achieve a result, such as evidence of self-mitigating measures, informal accommodations, or recently provided reasonable modifications, is inherently subjective and unreliable. The testing entities suggested that the Department had indicated support for their interest in focusing on outcomes over process-related obstacles in the NPRM preamble language where the Department had noted that covered entities "may defeat a showing of substantial limitation by refuting whatever evidence the individual seeking coverage has offered, or by offering evidence that shows that an impairment does not impose a substantial limitation on a major life activity." NPRM, 79 FR 4839, 4847-48 (Jan. 30, 2014). The commenters representing educational institutions and testing entities urged the removal of §§ 35.108(d)(3)(iii) and 36.105(d)(3)(iii) or, in the alternative, the insertion of language indicating that outcomes, such as grades and test scores indicating academic success, are relevant evidence that should be considered when making disability determinations.

In contrast, commenters representing persons with disabilities and individual commenters expressed strong support for these provisions, noting that what an individual can accomplish despite an impairment does not accurately reflect the obstacles an individual had to overcome because of the impairment. One organization representing persons with disabilities noted that while individuals with disabilities have achieved successes at work, in academia, and in other settings, their successes should not create obstacles to addressing what they can do "in spite of an impairment." Commenters also expressed concerns that testing entities and educational institutions had failed to comply with the rules of construction or to revise prior policies and practices to comport with the new standards under the ADA as amended. Some commenters asserted that testing entities improperly rejected accommodation requests because the testing entities focused on test scores and outcomes rather than on how individuals learn; required severe levels of impairment; failed to disregard the helpful effect of self-mitigating

measures; referenced participation in extracurricular activities as evidence that individuals did not have disabilities; and argued that individuals diagnosed with specific learning disabilities or ADHD in adulthood cannot demonstrate that they have a disability because their diagnosis occurred too late.

Commenters representing persons with disabilities pointed to the discussion in the legislative history about restoring a focus on process rather than outcomes with respect to learning disabilities. They suggested that such a shift in focus also would be helpful in evaluating ADHD. One commenter asked the Department to include a reference to ADHD and to explain that persons with ADHD may achieve a high level of academic success but may nevertheless be substantially limited in one or more major life activities, such as reading, writing, speaking, concentrating, or learning. A private citizen requested the addition of examples demonstrating the application of these provisions because, in the commenter's view, there have been many problems with decisions regarding individuals with learning disabilities and an inappropriate focus on outcomes and test scores.

The Department declines the request to add a specific reference to ADHD in these provisions. The Department believes that the principles discussed above apply equally to persons with ADHD as well as individuals with other impairments. The provision already references an illustrative, but not exclusive, example of an individual with a learning disability. The Department believes that this example effectively illustrates the concern that has affected individuals with other impairments due to an inappropriate emphasis on outcomes rather than how a major life activity is limited.

Organizations representing testing and educational entities asked the Department to add regulatory language indicating that testing-related outcomes, such as grades and test scores, are relevant to disability determinations under the ADA. The Department has considered this proposal and declines to adopt it because it is inconsistent with congressional intent. As discussed earlier in this section, Congress specifically stated that the outcome an individual with a disability is able to achieve is not determinative of whether that individual has a physical or mental impairment that substantially limits a major life activity. The analysis of whether an individual with an impairment has a disability is a fact-driven analysis shaped by how an impairment has substantially limited one or more major life activities or major bodily functions, considering those specifically asserted by the individual as well as any others that may apply. For example, if an individual with ADHD seeking a reasonable modification or a testing accommodation asserts substantial limitations in the major life activities of concentrating and reading, then the analysis of whether or not that individual has a covered disability will necessarily focus on concentrating and reading. Relevant considerations could include restrictions on the conditions, manner, or duration in which the individual concentrates or reads, such as a need for a non-stimulating environment or extensive time required to read. Even if an individual has asserted that an impairment creates substantial limitations on activities such as reading, writing, or concentrating, the individual's academic record or prior standardized testing results might not be relevant to the inquiry. Instead, the individual could show substantial limitations by providing evidence of condition, manner, or duration limitations, such as the need for a reader or additional time. The Department does not believe that the testing results or grades of an individual seeking reasonable modifications or testing accommodations always would be relevant to determinations of disability. While testing and educational entities may, of course, put forward any evidence that they deem pertinent to their response to an assertion of substantial limitation, testing results and grades may be of only limited relevance.

In addition, the Department does not agree with the assertions made by testing and educational entities that evidence of testing and grades is objective and, therefore, should be weighted more heavily, while evidence of self-mitigating measures, informal accommodations, or recently provided accommodations or modifications is inherently subjective and should be afforded less consideration. Congress's discussion of the relevance of testing outcomes and grades clearly indicates that it did not consider them definitive evidence of the existence or non-existence of a disability. While tests and grades typically are numerical measures of performance, the capacity to

quantify them does not make them inherently more valuable with respect to proving or disproving disability. To the contrary, Congress's incorporation of rules of construction emphasizing broad coverage of disabilities to the maximum extent permitted, its direction that such determinations should neither contemplate ameliorative mitigating measures nor demand extensive analysis, and its recognition of learned and adaptive modifications all support its openness for individuals with impairments to put forward a wide range of evidence to demonstrate their disabilities.

The Department believes that Congress made its intention clear that the ADA's protections should encompass people for whom the nature of their impairment requires an assessment that focuses on how they engage in major life activities, rather than the ultimate outcome of those activities. Beyond directly addressing this concern in the debate over the ADA Amendments Act, Congress's incorporation of the far-reaching rules of construction, its explicit rejection of the consideration of ameliorative mitigating measures—including “learned behavioral or adaptive neurological modifications,” 42 U.S.C. 12102(4)(E)(i)(IV), such as those often employed by individuals with learning disabilities or ADHD—and its stated intention to “reinstat[e] a broad scope of protection to be available under the ADA,” Public Law 110-325, sec. 2(b)(1), all support the language initially proposed in these provisions. For these reasons, the Department determined that it will retain the language of these provisions as they were originally drafted.

## Analysis of Condition, Manner, or Duration Not Always Required

As noted in the discussion above, the Department has added §§ 35.108(d)(3)(iv) and 36.105(d)(3)(iv) in the final rule to clarify that analysis of condition, manner, or duration will not always be necessary, particularly with respect to certain impairments that can easily be found to substantially limit a major life activity. This language is also found in the EEOC ADA title I regulation. See 29 CFR 1630(j)(4)(iv). As noted earlier, the inclusion of these provisions addresses several comments from organizations representing persons with disabilities. This language also responds to several commenters' concerns that the Department should clarify that, in some cases and particularly with respect to predictable assessments, no or only a very limited analysis of condition, manner, or duration is necessary.

At the same time, individuals seeking coverage under the first or second prong of the definition of “disability” should not be constrained from offering evidence needed to establish that their impairment is substantially limiting. See 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). Such evidence may comprise facts related to condition, manner, or duration. And, covered entities may defeat a showing of substantial limitation by refuting whatever evidence the individual seeking coverage has offered, or by offering evidence that shows that an impairment does not impose a substantial limitation on a major life activity. However, a showing of substantial limitation is not defeated by facts unrelated to condition, manner, or duration that are not pertinent to the substantial limitation of a major life activity that the individual has proffered.

## Sections 35.108(d)(4) and 36.105(d)(4)—Examples of Mitigating Measures

The rules of construction set forth at §§ 35.108(d)(1)(viii) and 36.105(d)(1)(viii) of the final rule make clear that the ameliorative effects of mitigating measures shall not be considered when determining whether an impairment substantially limits a major life activity. In the NPRM, proposed §§ 35.108(d)(4) and 36.105(d)(4) provided a non-inclusive list of mitigating measures, which includes medication, medical supplies, equipment, appliances, low-vision devices, prosthetics, hearing aids, cochlear implants and implantable hearing devices, mobility devices,

oxygen therapy equipment, and assistive technology. In addition, the proposed regulation clarified that mitigating measures can include “learned behavioral or adaptive neurological modifications,” psychotherapy, behavioral therapy, or physical therapy, and “reasonable modifications” or auxiliary aids and services.

The phrase “learned behavioral or adaptive neurological modifications,” is intended to include strategies developed by an individual to lessen the impact of an impairment. The phrase “reasonable modifications” is intended to include informal or undocumented accommodations and modifications as well as those provided through a formal process.

The ADA as amended specifies one exception to the rule on mitigating measures, stating that the ameliorative effects of ordinary eyeglasses and contact lenses shall be considered in determining whether a person has an impairment that substantially limits a major life activity and thereby is a person with a disability. 42 U.S.C. 12102(4)(E)(ii). As discussed above, §§ 35.108(d)(4)(i) and 36.105(d)(4)(i) incorporate this exception by excluding ordinary eyeglasses and contact lenses from the definition of “low-vision devices,” which are mitigating measures that may not be considered in determining whether an impairment is a substantial limitation.

The Department received a number of comments supporting the Department's language in these sections and its broad range of examples of what constitutes a mitigating measure. Commenters representing students with disabilities specifically supported the inclusion of “learned behavioral or adaptive neurological modifications,” noting that the section “appropriately supports and highlights that students [and individuals in other settings] may have developed self-imposed ways to support their disability in order to perform major life activities required of daily life and that such measures cannot be used to find that the person is not substantially limited.”

The Department notes that self-mitigating measures or undocumented modifications or accommodations for students who have impairments that substantially limit learning, reading, writing, speaking, or concentrating may include such measures as arranging to have multiple reminders for task completion; seeking help from others to provide reminders or to assist with the organization of tasks; selecting courses strategically (such as selecting courses that require papers instead of exams); devoting a far larger portion of the day, weekends, and holidays to study than students without disabilities; teaching oneself strategies to facilitate reading connected text or mnemonics to remember facts (including strategies such as highlighting and margin noting); being permitted extra time to complete tests; receiving modified homework assignments; or taking exams in a different format or in a less stressful or anxiety-provoking setting. Each of these mitigating measures, whether formal or informal, documented or undocumented, can improve the academic function of a student having to deal with a substantial limitation in a major life activity such as concentrating, reading, speaking, learning, or writing. However, when the determination of disability is made without considering the ameliorative effects of these measures, as required under the ADA as amended, these individuals still have a substantial limitation in major life activities and are covered by the ADA. See also discussion of §§ 35.108(d)(1) and 36.105(d)(1), above.

Some commenters argued that the Department's examples of mitigating measures inappropriately include normal learning strategies and asked that the Department withdraw or narrow its discussion of self-mitigating measures. The Department disagrees. Narrowing the discussion of self-mitigating measures to exclude normal or common strategies would not be consistent with the ADA Amendments Act. The Department construes learned behavioral or adaptive neurological modifications broadly to include strategies applied or utilized by an individual with a disability to lessen the effect of an impairment; whether the strategy applied is normal or common to students without disabilities is not relevant to whether an individual with a disability's application of the strategy lessens the effect of an impairment.

An additional commenter asked the Department to add language to the regulation and preamble addressing mitigating measures an individual with ADHD may employ. This commenter noted that “[a]n individual with ADHD may employ a wide variety of self-mitigating measures, such as exertion of extensive extra effort, use of multiple reminders, whether low tech or high tech, seeking a quiet or distraction free place or environment to do required activities.” The Department agrees with this commenter that these are examples of the type of self-mitigating measures used by individuals with ADHD, but believes that they fall within the range of mitigating measures already addressed by the regulatory language.

Another commenter asked the Department to add language to the regulation or preamble addressing surgical interventions in a similar fashion to the approach taken in the EEOC's title I preamble, 76 FR 16978, 16983 (Mar. 25, 2011). There, the EEOC noted that a surgical intervention may be an ameliorative mitigating measure that could result in the permanent elimination of an impairment, but it also indicated that confusion about how this example might apply recommended against its inclusion in the regulatory text. Therefore, the EEOC eliminated that example from the draft regulatory text and recommended that, “[d]eterminations about whether surgical interventions should be taken into consideration when assessing whether an individual has a disability are better assessed on a case-by-case basis.” The Department agrees with the EEOC and underscores that surgical interventions may constitute mitigating measures that should not be considered in determining whether an individual meets the definition of “disability.” The Department declines to make any changes to its proposed regulatory text for these sections of the final rule.

The ADA Amendments Act provides an “illustrative but non-comprehensive list of the types of mitigating measures that are not to be considered.” 114 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers) at 9; see also H.R. Rep. No. 110-730, pt. 2, at 20 (2008). The absence of any particular mitigating measure should not convey a negative implication as to whether the measure is a mitigating measure under the ADA. *Id.* This principle applies equally to the non-exhaustive list in §§ 35.108(d)(4) and 36.105(d)(4).

## **Sections 35.108(e) and 36.105(e)—Has a Record of Such an Impairment**

The second prong of the definition of “disability” under the ADA provides that an individual with a record of an impairment that substantially limits or limited a major life activity is an individual with a disability. 42 U.S.C. 12102(1)(B).

Paragraph (3) of the definition of “disability” in the existing title II and title III regulations states that the phrase “has a record of such an impairment” means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. 28 CFR 35.104, 36.104. The NPRM proposed keeping the language in the title II and title III regulations (with minor editorial changes) but to renumber it as §§ 35.108(e)(1) and 36.105(e)(1). In addition, the NPRM proposed adding a new second paragraph stating that any individual’s assertion of a record of impairment that substantially limits a major life activity should be broadly construed to the maximum extent permitted by the ADA and should not require extensive analysis. If an individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population or was misclassified as having had such an impairment, then that individual will satisfy the third prong of the definition of “disability.” The NPRM also proposed adding paragraph (3), which provides that “[a]n individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.”

The Department received no comments objecting to its proposed language for these provisions and has retained it in the final rule. The Department received one comment requesting additional guidance on the meaning of these provisions. The Department notes that Congress intended this prong of the definition of "disability" to ensure that people are not discriminated against based on prior medical history. This prong is also intended to ensure that individuals are not discriminated against because they have been misclassified as an individual with a disability. For example, individuals misclassified as having learning disabilities or intellectual disabilities are protected from discrimination on the basis of that erroneous classification. See H.R. Rep. No. 110-730, pt. 2, at 7-8 & n.14 (2008).

This prong of the definition is satisfied where evidence establishes that an individual has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities. The terms "substantially limits" and "major life activity" under the second prong of the definition of "disability" are to be construed in accordance with the same principles applicable under the "actual disability" prong, as set forth in §§ 35.108(b) and 36.105(b).

There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records. The Department notes that past history of an impairment need not be reflected in a specific document. Any evidence that an individual has a past history of an impairment that substantially limited a major life activity is all that is necessary to establish coverage under the second prong. An individual may have a "record of" a substantially limiting impairment—and thus establish coverage under the "record of" prong of the statute—even if a covered entity does not specifically know about the relevant record. For the covered entity to be liable for discrimination under the ADA, however, the individual with a "record of" a substantially limiting impairment must prove that the covered entity discriminated on the basis of the record of the disability.

Individuals who are covered under the "record of" prong may be covered under the first prong of the definition of "disability" as well. This is because the rules of construction in the ADA Amendments Act and the Department's regulations provide that an individual with an impairment that is episodic or in remission can be protected under the first prong if the impairment would be substantially limiting when active. See §§ 35.108(d)(1)(iv); 36.105(d)(1)(iv). Thus, an individual who has cancer that is currently in remission is an individual with a disability under the "actual disability" prong because he has an impairment that would substantially limit normal cell growth when active. He is also covered by the "record of" prong based on his history of having had an impairment that substantially limited normal cell growth.

Finally, these provisions of the regulations clarify that an individual with a record of a disability is entitled to a reasonable modification currently needed relating to the past substantially limiting impairment. In the legislative history, Congress stated that reasonable modifications were available to persons covered under the second prong of the definition. See H.R. Rep. No. 110-730, pt. 2, at 22 (2008) ("This makes clear that the duty to accommodate . . . arises only when an individual establishes coverage under the first or second prong of the definition."). For example, a high school student with an impairment that previously substantially limited, but no longer substantially limits, a major life activity may need permission to miss a class or have a schedule change as a reasonable modification that would permit him or her to attend follow-up or monitoring appointments from a health care provider.

## Sections 35.108(f) and 36.105(f)—Is Regarded as Having Such an Impairment

The "regarded as having such an impairment" prong of the definition of "disability" was included in the ADA specifically to protect individuals who might not meet the first two prongs of the definition, but who were subject to adverse decisions by covered entities based upon unfounded concerns, mistaken beliefs, fears, myths, or prejudices about persons with disabilities. See 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers).

The rationale for the “regarded as” part of the definition of “disability” was articulated by the Supreme Court in the context of section 504 of the Rehabilitation Act of 1973 in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). In *Arline*, the Court noted that, although an individual may have an impairment that does not diminish his or her physical or mental capabilities, it could “nevertheless substantially limit that person’s ability to work as a result of the negative reactions of others to the impairment.” *Id.* at 283. Thus, individuals seeking the protection of the ADA under the “regarded as” prong only had to show that a covered entity took some action prohibited by the statute because of an actual or perceived impairment. At the time of the *Arline* decision, there was no requirement that the individual demonstrate that he or she, in fact, had or was perceived to have an impairment that substantially limited a major life activity. See 154 Cong. Rec. S8842 (daily ed. Sept. 16, 2008) (Statement of the Managers). For example, if a daycare center refused to admit a child with burn scars because of the presence of the scars, then the daycare center regarded the child as an individual with a disability, regardless of whether the child’s scars substantially limited a major life activity.

In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Supreme Court significantly narrowed the application of this prong, holding that individuals who asserted coverage under the “regarded as having such an impairment” prong had to establish either that the covered entity mistakenly believed that the individual had a physical or mental impairment that substantially limited a major life activity, or that the covered entity mistakenly believed that “an actual, nonlimiting impairment substantially limit[ed]” a major life activity, when in fact the impairment was not so limiting. *Id.* at 489. Congress expressly rejected this standard in the ADA Amendments Act by amending the ADA to clarify that it is sufficient for an individual to establish that the covered entity regarded him or her as having an impairment, regardless of whether the individual actually has the impairment or whether the impairment constitutes a disability under the Act. 42 U.S.C. 12102(3)(A). This amendment restores Congress’s intent to allow individuals to establish coverage under the “regarded as” prong by showing that they were treated adversely because of an actual or perceived impairment without having to establish the covered entity’s beliefs concerning the severity of the impairment. See H.R. Rep. No. 110-730, pt. 2, at 18 (2008).

Thus, under the ADA as amended, it is not necessary, as it was prior to the ADA Amendments Act and following the Supreme Court’s decision in *Sutton*, for an individual to demonstrate that a covered entity perceived him as substantially limited in the ability to perform a major life activity in order for the individual to establish that he or she is covered under the “regarded as” prong. Nor is it necessary to demonstrate that the impairment relied on by a covered entity is (in the case of an actual impairment) or would be (in the case of a perceived impairment) substantially limiting for an individual to be “regarded as having such an impairment.” In short, to be covered under the “regarded as” prong, an individual is not subject to any functional test. See 154 Cong. Rec. S8843 (daily ed. Sept. 16, 2008) (Statement of the Managers) (“The functional limitation imposed by an impairment is irrelevant to the third ‘regarded as’ prong.”); H.R. Rep. No. 110-730, pt. 2, at 17 (2008) (“[T]he individual is not required to show that the perceived impairment limits performance of a major life activity.”) The concepts of “major life activities” and “substantial limitation” simply are not relevant in evaluating whether an individual is “regarded as having such an impairment.”

In the NPRM, the Department proposed §§ 35.108(f)(1) and 36.105(f)(1), which are intended to restore the meaning of the “regarded as” prong of the definition of “disability” by adding language that incorporates the amended statutory provision: “An individual is ‘regarded as having such an impairment’ if the individual is subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, except for an impairment that is both transitory and minor.”

The proposed provisions also incorporate the statutory definition of transitory impairment, stating that a “transitory impairment is an impairment with an actual or expected duration of six months or less.” The “transitory and minor” exception was not in the third prong in the original statutory definition of “disability.” Congress added this exception to address concerns raised by the business community that “absent this exception, the third prong of the definition would have covered individuals who are regarded as having common ailments like the cold or flu.” See H.R. Rep. No. 110-730, pt. 2, at 18 (2008). However, as an exception to the general rule for broad coverage under the “regarded as” prong, this limitation on coverage should be construed narrowly. *Id.* The ADA Amendments Act did not define “minor.”

In addition, proposed §§ 35.108(f)(2) and 36.105(f)(2) stated that any time a public entity or covered entity takes a prohibited action because of an individual's actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action, that individual is “regarded as” having such an impairment. Commenters on these provisions recommended that the Department revise its language to clarify that the determination of whether an impairment is in fact “transitory and minor” is an objective determination and that a covered entity may not defeat “regarded as” coverage of an individual simply by demonstrating that it subjectively believed that the impairment is transitory and minor. In addition, a number of commenters cited the EEOC title I rule at 29 CFR 1630.15(f) and asked the Department to clarify that “the issue of whether an actual or perceived impairment is ‘transitory and minor’ is an affirmative defense and not part of the plaintiff’s burden of proof.” The Department agrees with these commenters and has revised paragraphs (1) and (2) of these sections for clarity, as shown in §§ 35.108(f)(2) and 36.105(f)(2) of the final rule.

The revised language makes clear that the relevant inquiry under these sections is whether the actual or perceived impairment that is the basis of the covered entity's action is objectively “transitory and minor,” not whether the covered entity claims it subjectively believed the impairment was transitory and minor. For example, a private school that expelled a student whom it believes has bipolar disorder cannot take advantage of this exception by asserting that it believed the student's impairment was transitory and minor, because bipolar disorder is not objectively transitory and minor. Similarly, a public swimming pool that refused to admit an individual with a skin rash, mistakenly believing the rash to be symptomatic of HIV, will have “regarded” the individual as having a disability. It is not a defense to coverage that the skin rash was objectively transitory and minor because the covered entity took the prohibited action based on a perceived impairment, HIV, that is not transitory and minor.

The revised regulatory text also makes clear that the “transitory and minor” exception to a “regarded as” claim is a defense to a claim of discrimination and not part of an individual's *prima facie* case. The Department reiterates that to fall within this exception, the actual or perceived impairment must be *both* transitory (less than six months in duration) *and* minor. For example, an individual with a minor back injury could be “regarded as” an individual with a disability if the back impairment lasted or was anticipated to last more than six months. The Department notes that the revised regulatory text is consistent with the EEOC rule which added the transitory and minor exception to its general affirmative defense provision in its title I ADA regulation at 29 CFR 1630.15(f). Finally, in the NPRM, the Department proposed §§ 35.108(f)(3) and 36.105(f)(3) which provided that an individual who is “regarded as having such an impairment” does not establish liability based on that alone. Instead, an individual can establish liability only when an individual proves that a private entity or covered entity discriminated on the basis of disability within the meaning of the ADA. This provision was intended to make it clear that in order to establish liability, an individual must establish coverage as a person with a disability, as well as establish that he or she had been subjected to an action prohibited by the ADA.

The Department received no comments on the language in these paragraphs. Upon consideration, in the final rule, the Department has decided to retain the regulatory text for §§ 35.108(f)(3) and 36.105(f)(3) except that the reference to “covered entity” in the title III regulatory text is changed to “public accommodation.”

## Sections 35.108(g) and 36.105(g)—Exclusions

The NPRM did not propose changes to the text of the existing exclusions contained in paragraph (5) of the definition of "disability" in the title II and title III regulations, see 28 CFR 35.104, 36.104, which are based on 42 U.S.C. 12211(b), a statutory provision that was not modified by the ADA Amendments Act. The NPRM did propose to renumber these provisions, relocating them at §§ 35.108(g) and 36.105(g) of the Department's revised definition of "disability." The Department received no comments on the proposed renumbering, which is retained in the final rule.

## Sections 35.130(b)(7)(i)—General Prohibitions Against Discrimination and 36.302(g)—Modifications in Policies, Practices, or Procedures

The ADA Amendments Act revised the ADA to specify that a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, "need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability" solely on the basis of being regarded as having an impairment. 42 U.S.C. 12201(h). In the NPRM, the Department proposed §§ 35.130(b)(7)(i) and 36.302(g) to reflect this concept, explaining that a public entity or covered entity "is not required to provide a reasonable modification to an individual who meets the definition of disability solely under the 'regarded as' prong of the definition of disability." These provisions clarify that the duty to provide reasonable modifications arises only when the individual establishes coverage under the first or second prong of the definition of "disability." These provisions are not intended to diminish the existing obligations to provide reasonable modifications under title II and title III of the ADA.

The Department received no comments associated with these provisions and retains the NPRM language in the final rule except for replacing the words "covered entity" with "public accommodation" in § 36.302(g).

## Sections 35.130(i) and 36.201(c)—Claims of No Disability

The ADA as amended provides that "[n]othing in this [Act] shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability." 42 U.S.C. 12201(g). In the NPRM the Department proposed adding §§ 35.130(i) and 36.201(c) to the title II and title III regulations, respectively, which incorporate similar language. These provisions clarify that persons without disabilities do not have an actionable claim under the ADA on the basis of not having a disability.

The Department received no comments associated with this issue and has retained these provisions in the final rule.

## Effect of ADA Amendments Act on Academic Requirements in Postsecondary Education

The Department notes that the ADA Amendments Act revised the rules of construction in title V of the ADA by including a provision affirming that nothing in the Act changed the existing ADA requirement that covered entities provide reasonable modifications in policies, practices, or procedures unless the entity can demonstrate that making such modifications, including academic requirements in postsecondary education, would fundamentally alter the nature of goods, services, facilities, privileges, advantages, or accommodations involved. See 42 U.S.C.

12201(f). Congress noted that the reference to academic requirements in postsecondary education was included "solely to provide assurances that the bill does not alter current law with regard to the obligations of academic institutions under the ADA, which we believe is already demonstrated in case law on this topic. Specifically, the reference to academic standards in post-secondary education is unrelated to the purpose of this legislation and should be given no meaning in interpreting the definition of disability." 154 Cong. Rec. S8843 (daily ed. Sept. 16, 2008) (Statement of the Managers). Given that Congress did not intend there to be any change to the law in this area, the Department did not propose to make any changes to its regulatory requirements in response to this provision of the ADA Amendments Act.

[AG Order 3702-2016, 81 FR 53225, Aug. 11, 2016]

## **Appendix D to Part 35—Guidance to Revisions to ADA Title II Regulation on Accessibility of Web Information and Services of State and Local Government Entities**

Note: This appendix contains guidance providing a section-by-section analysis of the revisions to this part published on April 24, 2024.

### **Section-by-Section Analysis and Response to Public Comments**

This appendix provides a detailed description of the Department's changes to this part (the title II regulation), the reasoning behind those changes, and responses to public comments received in connection with the rulemaking. The Department made changes to subpart A of this part and added subpart H to this part. The section-by-section analysis addresses the changes in the order they appear in the title II regulation.

#### **Subpart A—General**

##### **Section 35.104 Definitions**

###### **"Archived Web Content"**

The Department is including in § 35.104 a definition for "archived web content." "Archived web content" is defined as web content that was created before the date the public entity is required to comply with subpart H of this part, reproduces paper documents created before the date the public entity is required to comply with subpart H, or reproduces the contents of other physical media created before the date the public entity is required to comply with subpart H. Second, the web content is retained exclusively for reference, research, or recordkeeping. Third, the web content is not altered or updated after the date of archiving. Fourth, the web content is organized and stored in a dedicated area or areas clearly identified as being archived. The definition is meant to capture historic web content that, while outdated or superfluous, is maintained unaltered in a dedicated archived area for reference, research, or recordkeeping. The term is used in the exception set forth in § 35.201(a). The Department provides a more detailed explanation of the application of the exception in the section-by-section analysis of § 35.201(a).

The Department made several revisions to the definition of “archived web content” from the notice of proposed rulemaking (“NPRM”). The Department added a new part to the definition to help clarify the scope of content covered by the definition and associated exception. The new part of the definition, the first part, specifies that archived web content is limited to three types of historic content: web content that was created before the date the public entity is required to comply with subpart H of this part; web content that reproduces paper documents created before the date the public entity is required to comply with subpart H; and web content that reproduces the contents of other physical media created before the date the public entity is required to comply with subpart H.

Web content that was created before the date a public entity is required to comply with subpart H of this part satisfies the first part of the definition. In determining the date web content was created, the Department does not intend to prohibit public entities from making minor adjustments to web content that was initially created before the relevant compliance dates specified in § 35.200(b), such as by redacting personally identifying information from web content as necessary before it is posted to an archive, even if the adjustments are made after the compliance date. In contrast, if a public entity makes substantial changes to web content after the date the public entity is required to comply with subpart H, such as by adding, updating, or rearranging content before it is posted to an archive, the content would likely no longer meet the first part of the definition. If the public entity later alters or updates the content after it is posted in an archive, the content would not meet the third part of the definition of “archived web content” and it would generally need to conform to WCAG 2.1 Level AA.

Web content that reproduces paper documents or that reproduces the contents of other physical media would also satisfy the first part of the definition if the paper documents or the contents of the other physical media were created before the date the public entity is required to comply with subpart H of this part. Paper documents include various records that may have been printed, typed, handwritten, drawn, painted, or otherwise marked on paper. Videotapes, audiotapes, film negatives, CD-ROMs, and DVDs are examples of physical media. The Department anticipates that public entities may identify or discover historic paper documents or historic content contained on physical media that they wish to post in an online archive following the time they are required to comply with subpart H. For example, a State agricultural agency might move to a new building after the date it is required to comply with subpart H and discover a box in storage that contains hundreds of paper files and photo negatives from 1975 related to farms in the state at that time. If the agency reproduced the documents and photos from the film negatives as web content, such as by scanning the documents and film negatives and saving the scans as PDF documents that are made available online, the resulting PDF documents would meet the first part of the definition of “archived web content” because the underlying paper documents and photos were created in 1975. The Department reiterates that it does not intend to prohibit public entities from making minor adjustments to web content before posting it to an archive, such as by redacting personally identifying information from paper documents. Therefore, the State agricultural agency could likely redact personally identifying information about farmers from the scanned PDFs as necessary before posting them to its online archive. But, if the agency were to make substantial edits to PDFs, such as by adding, updating, or rearranging content before posting the PDFs to its archive, the PDFs would likely not meet the first part of the definition of “archived web content” because, depending on the circumstances, they may no longer be a reproduction of the historic content. In addition, if the agency later altered or updated the PDFs after they were posted in an archive, the content would not meet the third part of the definition of “archived web content” and it would generally need to conform to WCAG 2.1 Level AA.

The Department added the first part to the definition of “archived web content” after considering all the comments it received. In the NPRM, the Department sought feedback about the archived web content exception, including whether there are alternatives to the exception that the Department should consider or additional limitations that should be placed on the exception.<sup>[1]</sup> Commenters suggested various ways to add a time-based limitation to the definition or exception. For example, some commenters suggested that archived content should be limited to content created or posted before a certain date, such as the date a public entity is required to comply with subpart

H of this part; there should be a certain time period before web content can be archived, such as two years after the content is created or another time frame based on applicable laws related to public records; the exception should expire after a certain period of time; or public entities should have to remediate archived web content over time, prioritizing content that is most important for members of the public. In contrast, another commenter suggested that the exception should apply to archived web content posted after the date the public entity is required to comply with subpart H if the content is of historical value and only minimally altered before posting.

After reviewing the comments, the Department believes the first part of the definition sets an appropriate time-based limitation on the scope of content covered by the definition and exception that is consistent with the Department's stated intent in the NPRM. In the NPRM, the Department explained that the definition of "archived web content" and the associated exception were intended to cover historic content that is outdated or superfluous.<sup>[2]</sup> The definition in § 35.104, which is based on whether the relevant content was created before the date a public entity is required to comply with subpart H of this part, is now more aligned with, and better situated to implement, the Department's intent to cover historic content. The Department believes it is appropriate to include a time-based limitation in the definition, rather than to add new criteria stating that content must be historic, outdated, or superfluous, because it is more straightforward to differentiate content based on the date the content was created. Therefore, there will be greater predictability for individuals with disabilities and public entities as to which content is covered by the exception.

The Department declines to establish time-based limitations for when content may be posted to an archive or to otherwise set an expiration date for the exception. As discussed elsewhere in this appendix, the Department recognizes that many public entities will need to carefully consider the design and structure of their web content before dedicating a certain area or areas for archived content, and that, thereafter, it will take time for public entities to identify all content that meets the definition of "archived web content" and post it in the newly created archived area or areas. The archived web content exception thus provides public entities flexibility as to when they will archive web content, so long as the web content was created before the date the public entity was required to comply with subpart H of this part or the web content reproduces paper documents or the contents of other physical media created before the date the public entity was required to comply with subpart H. In addition, the Department does not believe it is necessary to establish a waiting period before newly created web created content can be posted in an archive. New content created after the date a public entity is required to comply with subpart H will generally not meet the first part of the definition of "archived web content." In the limited circumstances in which newly created web content could meet the first part of the definition because it reproduces paper documents or the contents of other physical media created before the date the public entity is required to comply with subpart H, the Department believes the scope of content covered by the exception is sufficiently limited by the second part of the definition: whether the content is retained exclusively for reference, research, or recordkeeping.

In addition to adding a new first part to the definition of "archived web content," the Department made one further change to the definition from the NPRM. In the NPRM, what is now the second part of the definition pertained to web content that is "maintained" exclusively for reference, research, or recordkeeping. The word "maintained" is now replaced with "retained." The revised language is not intended to change or limit the coverage of the definition. Rather, the Department recognizes that the word "maintain" can have multiple relevant meanings. In some circumstances, "maintain" may mean "to continue in possession" of property, whereas in other circumstances it

<sup>[1]</sup> 88 FR 51967.

<sup>[2]</sup> 88 FR 51966.

might mean “to engage in general repair and upkeep” of property.<sup>[3]</sup> The Department uses the word “maintain” elsewhere in the title II regulation, at § 35.133(a), consistent with the latter definition. In contrast, the third part of the definition for “archived web content” specifies that content must not be altered or updated after the date of archiving. Such alterations or updates could be construed as repair or upkeep, but that is not what the Department intended to convey with its use of the word “maintained” in this provision. To avoid confusion about whether a public entity can alter or update web content after it is archived, the Department instead uses the word “retained,” which has a definition synonymous with the Department’s intended use of “maintain” in the NPRM.<sup>[4]</sup>

Commenters raised concerns about several aspects of the definition of “archived web content.” With respect to the second part of the definition, commenters stated that the definition does not clearly articulate when content is retained exclusively for reference, research, or recordkeeping. Commenters stated that the definition could be interpreted inconsistently, and it could be understood to cover important information that should be accessible. For example, commenters were concerned that web content containing public entities’ past meeting minutes where key decisions were made would qualify as archived content, as well as web content containing laws, regulations, court decisions, or prior legal interpretations that are still relevant. Therefore, commenters suggested that the definition should not cover recordkeeping documents, agendas, meeting minutes, and other related documents at all. One commenter recommended adding to the definition to clarify that it does not apply to content a public entity uses to offer a current service, program, or activity, and another commenter suggested that content should be archived depending on how frequently members of the public seek to access the content. One commenter also stated that the Department is left with the responsibility to determine whether web content is appropriately designated as archived when enforcing subpart H of this part in the future, and the commenter believed that this enforcement may be insufficient to avoid public entities evading their responsibilities under subpart H. Another commenter recommended that the Department should conduct random audits to determine if public entities are properly designating archived web content.

The Department’s revised definition of “archived web content,” and specifically the new first part of the definition, make clear that the definition only pertains to content created before the date the public entity is required to comply with subpart H of this part. Therefore, new content such as agendas, meeting minutes, and other documents related to meetings that take place after the public entity is required to comply with subpart H would likely not meet all parts of the definition of “archived web content.” This revision to the regulatory text is responsive to comments raising the concern that current and newly created content might be erroneously labeled as archived based on perceived ambiguity surrounding when content is being retained solely for “reference, research, or recordkeeping.” Given the wide variety of web content that public entities provide or make available, the Department does not believe it is advisable to add additional, more specific language in the definition about what types of content are covered. The Department also believes it would be difficult to create a more specific and workable definition for “archived web content” based on how frequently members of the public seek to view certain content given the wide variation in the types and sizes of public entities and the volume of their web traffic. Whether web content is retained exclusively for reference, research, or recordkeeping will depend on the facts of the particular situation. Based on some of the examples of web content that commenters discussed in connection with the definition, the Department notes that if a public entity posts web content that identifies the current policies or procedures of the public entity, or posts web content containing or interpreting applicable laws or regulations related to the public

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<sup>[4]</sup> See *Retain*, Black's Law Dictionary (11th ed. 2019) (“To hold in possession or under control; to keep and not lose, part with, or dismiss.”).

<sup>[3]</sup> *Maintain*, Black's Law Dictionary (11th ed. 2019).

entity, that web content is unlikely to be covered by the exception. This is because the content is notifying members of the public about their ongoing rights and responsibilities. It therefore is not, as the definition requires, being used exclusively for reference, research, or recordkeeping.

Commenters also raised concerns about the fourth part of the definition of “archived web content,” which requires archived web content to be stored in a dedicated area or areas clearly identified as being archived. Some commenters did not believe public entities should be required to place archived web content in a dedicated area or areas clearly identified as being archived in order to be covered by the exception at § 35.201(a). Commenters stated that public entities should retain flexibility in organizing and storing files according to how their web content is designed and structured, and it might not be clear to members of the public to look for content in an archive depending on the overall makeup of the web content. Commenters also stated that it would be burdensome to create an archive area, identify web content for the archive, and move the content into the archive. One commenter stated that public entities might remove content rather than move it to a dedicated archive. Commenters instead suggested that the web content itself could be individually marked as archived regardless of where it is posted. One commenter also requested the Department clarify that the term “area” includes “websites” and “repositories” where archived web content is stored.

After carefully weighing these comments, the Department has decided not to change the fourth part of the definition for “archived web content.” The Department believes storing archived web content in a dedicated area or areas clearly identified as being archived will result in the greatest predictability for individuals with disabilities about which web content they can expect to conform to WCAG 2.1 Level AA. However, the Department notes that it did not identify specific requirements about the structure of an archived area, or how to clearly identify an area as being archived, in order to provide public entities greater flexibility when complying with subpart H of this part. For example, in some circumstances a public entity may wish to create separate web pages or websites to store archived web content. In other circumstances, a public entity may wish to clearly identify that a specific section on a specific web page contains archived web content, even if the web page also contains non-archived content in other separate sections. However public entities ultimately decide to store archived web content, the Department reiterates that predictability for individuals with disabilities is paramount. To this end, the label or other identification for a dedicated archived area or areas must be clear so that individuals with disabilities are able to detect when there is content they may not be able to access. Whether a particular dedicated area is clearly identified as being archived will, of course, depend on the facts of the particular situation. The Department also emphasizes that the existence of a dedicated area or areas for archived content must not interfere with the accessibility of other web content that is not archived.

Some commenters also recommended an alternative definition of “archived web content” that does not include the second or fourth parts of the definition. Commenters proposed that archived web content should be defined as web content that (1) was provided or made available prior to the effective date of the final rule and (2) is not altered or updated after the effective date of the final rule. While the Department agrees that a time-based distinction is appropriate and has therefore added the first part to the definition, the Department does not believe the commenters’ approach suggested here is advisable because it has the potential to cause a significant accessibility gap for individuals with disabilities if public entities rely on web content that is not regularly updated or changed. Under the commenters’ proposed definition, the exception for archived web content might cover important web content used for reasons other than reference, research, or recordkeeping if the content has not been updated or altered. As discussed in more detail in the section-by-section analysis of § 35.201(a), the purpose of the exception for archived web content is to help public entities focus their resources on making accessible the most important materials that people use most widely and consistently, rather than historic or outdated web content that is only

used for reference, research, or recordkeeping. Furthermore, as discussed in the preceding paragraph, the Department believes the fourth part of the definition is necessary to ensure the greatest predictability for individuals with disabilities about which web content they can expect to conform to WCAG 2.1 Level AA.

Commenters made other suggestions related to the definition of and exception for “archived web content.” The Department has addressed these comments in the discussion of the § 35.201(a) archived web content exception in the section-by-section analysis.

### ***“Conventional Electronic Documents”***

The Department is including in § 35.104 a definition for “conventional electronic documents.” “Conventional electronic documents” are defined as web content or content in mobile apps that is in the following electronic file formats: portable document formats, word processor file formats, presentation file formats, and spreadsheet file formats. The definition thus provides an exhaustive list of electronic file formats that constitute conventional electronic documents. Examples of conventional electronic documents include: Adobe PDF files (*i.e.*, portable document formats), Microsoft Word files (*i.e.*, word processor files), Apple Keynote or Microsoft PowerPoint files (*i.e.*, presentation files), and Microsoft Excel files (*i.e.*, spreadsheet files). The term “conventional electronic documents” is used in § 35.201(b) to provide an exception for certain such documents that are available as part of a public entity's web content or mobile apps before the compliance date of subpart H of this part, unless such documents are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities. The term is also used in § 35.201(d) to provide an exception for certain individualized, password-protected or otherwise secured conventional electronic documents, and is addressed in more detail in the discussion in the section-by-section analysis of § 35.201(b) and (d). The definition of “conventional electronic documents” covers documents created or saved as electronic files that are commonly available in an electronic form on public entities' web content and mobile apps and that would have been traditionally available as physical printed output.

In the NPRM, the Department asked whether it should craft a more flexible definition of “conventional electronic documents” instead of a definition based on an exhaustive list of file formats.<sup>[5]</sup> In response, the Department heard a range of views from commenters. Some commenters favored a broader and more generalized definition instead of an exhaustive list of file formats. For example, commenters suggested that the Department could describe the properties of conventional electronic documents and provide a non-exhaustive list of examples of such documents, or the definition could focus on the importance of the content contained in a document rather than the file format. Some commenters favoring a broader definition reasoned that technology evolves rapidly, and the exhaustive list of file formats the Department identified might not keep pace with technological advancements.

Other commenters preferred the Department's approach of identifying an exhaustive list of file formats. Some commenters noted that an exhaustive list provides greater clarity and predictability, which assists public entities in identifying their obligations under subpart H of this part. Some commenters suggested that the Department could provide greater clarity by identifying specific file types in the regulatory text rather than listing file formats (*e.g.*, the Department might specify the Microsoft Word “.docx” file type rather than “word processor file formats”).

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<sup>[5]</sup> 88 FR 51958, 51968.

After considering all the comments, the Department declines to change its approach to defining conventional electronic documents. The Department expects that a more flexible definition would result in less predictability for both public entities and individuals with disabilities, especially because the Department does not currently have sufficient information about how technology will develop in the future. The Department seeks to avoid such uncertainty because the definition of “conventional electronic documents” sets the scope of two exceptions, § 35.201(b) and (d). The Department carefully balanced benefits for individuals with disabilities with the challenges public entities face in making their web content and mobile apps accessible in compliance with subpart H of this part when crafting these exceptions, and the Department does not want to inadvertently expand or narrow the exceptions with a less predictable definition of “conventional electronic documents.”

Unlike in the NPRM, the definition of “conventional electronic documents” does not include database file formats. In the NPRM, the Department solicited comments about whether it should add any file formats to, or remove any file formats from, the definition of “conventional electronic documents.” While some commenters supported keeping the list of file formats in the proposed definition as is, the Department also heard a range of views from other commenters. Some commenters, including public entities and trade groups representing public accommodations, urged the Department to add additional file formats to the definition of “conventional electronic documents.” For example, commenters recommended adding image files, video files, audio files, and electronic books such as EPUB (electronic publications) or DAISY (Digital Accessible Information System) files. Commenters noted that files in such other formats are commonly made available by public entities and they can be burdensome to remediate. Commenters questioned whether there is a basis for distinguishing between the file formats included in the definition and other file formats not included in the definition.

Other commenters believed the list of file formats included in the proposed definition of “conventional electronic documents” was too broad. A number of disability advocacy groups stated that certain document formats included in the definition are generally easily made accessible. Therefore, commenters did not believe such documents should generally fall within the associated exceptions under § 35.201(b) and (d). Some commenters also stated that there could be confusion about accessibility requirements for database files because database files and some spreadsheet files may include data that are not primarily intended to be human-readable. The commenters stated that in many cases such content is instead intended to be opened and analyzed with other special software tools. The commenters pointed out that data that is not primarily intended to be human-readable is equally accessible for individuals with disabilities and individuals without disabilities, and they recommended clarifying that the accessibility requirements do not apply to such data.

Some commenters suggested that certain file formats not included in the definition of “conventional electronic documents,” such as images or videos, may warrant different treatment altogether. For example, one public entity stated that it would be better to place images and multimedia in a separate and distinct category with a separate definition and relevant technical standards where needed to improve clarity. In addition, a disability advocacy organization stated that images do not need to be included in the definition and covered by the associated exceptions because public entities can already uniquely exempt this content in some circumstances by marking it as decorative, and it is straightforward for public entities to add meaningful alternative text to important images and photos that are not decorative.

After considering all the comments, the Department agrees that database file formats should not be included in the definition of “conventional electronic documents.” The Department now understands that database files may be less commonly available through public entities’ web content and mobile apps than other types of documents. To the extent such files are provided or made available by public entities, the Department understands that they would not be readable by either individuals with disabilities or individuals without disabilities if they only contain data that are not primarily intended to be human-readable. Therefore, there would be limited accessibility concerns, if any,

that fall within the scope of subpart H of this part associated with documents that contain data that are not primarily intended to be human-readable. Accordingly, the Department believes it could be confusing to include database file formats in the definition. However, the Department notes that while there may be limited accessibility concerns, if any, related to database files containing data that are not primarily intended to be human-readable, public entities may utilize these data to create outputs for web content or mobile apps, such as tables, charts, or graphs posted on a web page, and those outputs would be covered by subpart H unless they fall into another exception.

The Department declines to make additional changes to the list of file formats included in the definition of "conventional electronic documents." After reviewing the range of different views expressed by commenters, the Department believes the current list strikes the appropriate balance between ensuring access for individuals with disabilities and feasibility for public entities so that they can comply with subpart H of this part. The list included in the definition is also aligned with the Department's intention to cover documents that public entities commonly make available in either an electronic form or that would have been traditionally available as physical printed output. If public entities provide and make available files in formats not included in the definition, the Department notes that those other files may qualify for the exception in § 35.201(a) if they meet the definition for "archived web content," or the exception in § 35.201(e) for certain preexisting social media posts if they are covered by that exception's description. To the extent those other files are not covered by one of the exceptions in § 35.201, the Department also notes that public entities would not be required to make changes to those files that would result in a fundamental alteration in the nature of a service, program, or activity, or impose undue financial and administrative burdens, as discussed in the section-by-section analysis of § 35.204.

With respect to the comment suggesting that it would be better to place images and multimedia in a separate and distinct category with a separate definition and relevant technical standards where needed to improve clarity, the Department notes that the WCAG standards were designed to be "technology neutral."<sup>[6]</sup> This means that they are designed to be broadly applicable to current and future web technologies.<sup>[7]</sup> Accordingly, the Department believes WCAG 2.1 Level AA is the appropriate standard for other file formats not included in the definition of "conventional electronic documents" because WCAG 2.1 was crafted to address those other file formats as well.

The Department also recognizes that, as some commenters pointed out, this part treats conventional electronic documents differently than WCAG 2.1, in that conventional electronic documents are included in the definition of "web content" in § 35.104, while WCAG 2.1 does not include those documents in its definition of "web content." The Department addresses these comments in its analysis of the definition of "web content."

As discussed in the preceding paragraphs, the scope of the associated exception for preexisting conventional electronic documents, at § 35.201(b), is based on the definition of "conventional electronic documents." The definition applies to conventional electronic documents that are part of a public entity's web content or mobile apps. The exception also applies to "conventional electronic documents" that are part of a public entity's web content or mobile apps, but only if the documents were provided or made available before the date the public entity is required to comply with subpart H of this part. The Department received a comment indicating there may not be a logical connection between conventional electronic documents and mobile apps; therefore, according to the

<sup>[7]</sup> See W3C, *Understanding Techniques for WCAG Success Criteria*, <https://www.w3.org/WAI/WCAG21/Understanding/understanding-techniques> [<https://perma.cc/AMT4-XAAL>] (June 20, 2023).

<sup>[6]</sup> W3C, *Introduction to Understanding WCAG*, <https://www.w3.org/WAI/WCAG21/Understanding/intro> [<https://perma.cc/XB3Y-QKVU>] (June 20, 2023).

comment, the exception should not apply to conventional electronic documents that appear in mobile apps. However, the Department also received comments from disability advocacy organizations and public entities confirming the connection between the two technologies and stating that some mobile apps allow users to access conventional electronic documents. The Department will retain its approach of including “content in mobile apps” in the definition of “conventional electronic documents” given that the Department agrees that some mobile apps already use conventional electronic documents.

### ***“Mobile Applications (‘apps’)”***

Section 35.104 defines “mobile apps” as software applications that are downloaded and designed to run on mobile devices, such as smartphones and tablets. For purposes of this part, mobile apps include, for example, native apps built for a particular platform (e.g., Apple iOS, Google Android) or device and hybrid apps using web components inside native apps. This part will retain the definition of “mobile apps” from the NPRM without revision.

The Department received very few comments on this definition. One commenter noted that the Department does not appear to consider other technologies that may use mobile apps such as wearable technology. The Department notes that the definition’s examples of devices that use mobile apps (*i.e.*, smartphones and tablets) is a non-exhaustive list. Subpart H of this part applies to all mobile apps that a public entity provides or makes available, regardless of the devices on which the apps are used. The definition therefore may include mobile apps used on wearable technology. Accordingly, the proposed rule’s definition of “mobile apps” will remain unchanged in this part.

### ***“Special District Government”***

The Department has added a definition for “special district government.” The term “special district government” is used in § 35.200(b) and is defined in § 35.104 to mean a public entity—other than a county, municipality, township, or independent school district—authorized by State law to provide one function or a limited number of designated functions with sufficient administrative and fiscal autonomy to qualify as a separate government and whose population is not calculated by the United States Census Bureau in the most recent decennial Census or Small Area Income and Poverty Estimates. Because special district governments do not have populations calculated by the United States Census Bureau and are not necessarily affiliated with public entities that do have such populations, their population sizes are unknown. A special district government may include, for example, a mosquito abatement district, utility district, transit authority, water and sewer board, zoning district, or other similar governmental entity that may operate with administrative and fiscal independence. This definition is drawn in part from the U.S. Census Bureau definition<sup>[8]</sup> for purposes of setting a compliance time frame for a subset of public entities. It is not meant to alter the existing definition of “public entity” in § 35.104 in any way. The Department made one grammatical correction in this part to remove an extra “or” from the definition as proposed in the NPRM.<sup>[9]</sup> However, the substance of the definition is unchanged from the Department’s proposal in the NPRM.

### ***“Total Population”***

<sup>[9]</sup> 88 FR 52018.

<sup>[8]</sup> See U.S. Census Bureau, *Special District Governments*, <https://www.census.gov/glossary/?term=Special+district+governments> [<https://perma.cc/8V43-KKL9>] (last visited Feb. 26, 2024).

Section 35.200 provides the dates by which public entities must begin complying with the technical standard. The compliance dates are generally based on a public entity's total population, as defined in this part. The Department has added a definition for "total population" in § 35.104. If a public entity has a population calculated by the United States Census Bureau in the most recent decennial Census, the public entity's total population as defined in this part is the population estimate for that public entity as calculated by the United States Census Bureau in the most recent decennial Census. If a public entity is an independent school district, or an instrumentality of an independent school district, the entity's total population as defined in this part is the population estimate for the independent school district as calculated by the United States Census Bureau in the most recent Small Area Income and Poverty Estimates. If a public entity, other than a special district government or an independent school district, does not have a population estimate calculated by the United States Census Bureau in the most recent decennial Census, but is an instrumentality or a commuter authority of one or more State or local governments that do have such a population estimate, the entity's total population as defined in this part is the combined decennial Census population estimates for any State or local governments of which the public entity is an instrumentality or commuter authority. The total population for the National Railroad Passenger Corporation as defined in this part is the population estimate for the United States as calculated by the United States Census Bureau in the most recent decennial Census. The terminology used in the definition of "total population" draws from the terminology used in the definition of "public entity" in title II of the ADA<sup>[10]</sup> and the existing title II regulation,<sup>[11]</sup> and all public entities covered under title II of the ADA are covered by subpart H of this part. This part does not provide a method for calculating the total population of special district governments, because § 35.200 provides that all special district governments have three years following the publication of the final rule to begin complying with the technical standard, without reference to their population.

The regulatory text of this definition has been revised from the NPRM for clarity. The regulatory text of this definition previously provided that "total population" generally meant the population estimate for a public entity as calculated by the United States Census Bureau in the most recent decennial Census. Because the decennial Census does not include population estimates for public entities that are independent school districts, the regulatory text in the NPRM made clear that for independent school districts, "total population" would be calculated by reference to the population estimates as calculated by the United States Census Bureau in the most recent Small Area Income and Poverty Estimates. In recognition of the fact that some public entities do not have population estimates calculated by the United States Census Bureau, the preamble to the NPRM stated that if a public entity does not have a specific Census-defined population, but belongs to another jurisdiction that does, the population of the entity is determined by the population of the jurisdiction to which the entity belongs.<sup>[12]</sup> Although the preamble included this clarification, the Department received feedback that the regulatory text of this definition did not make clear how to calculate total population for public entities that do not have populations calculated by the United States Census Bureau. Accordingly, the Department has revised the regulatory text of the definition for clarity.

The revised regulatory text of this definition retains the language from the definition in the NPRM with respect to public entities that have populations calculated in the decennial Census and independent school districts that have populations calculated in the Small Area Income and Poverty Estimates. However, the revised regulatory text of this definition incorporates the approach described in the preamble of the NPRM with respect to how public entities that

[11] Section 35.104.

[10] 42 U.S.C. 12131(1).

[12] 88 FR 51948, 51949, 51958 (Aug. 4, 2023).

do not have populations calculated by the United States Census Bureau in the most recent decennial Census can determine their total populations as defined in this part. As the revised definition states, if a public entity, other than a special district government or independent school district, does not have a population estimate calculated by the United States Census Bureau in the most recent decennial Census, but is an instrumentality or a commuter authority of one or more State or local governments that do have such a population estimate, the total population for the public entity is determined by reference to the combined decennial Census population estimates for any State or local governments of which the public entity is an instrumentality or commuter authority. For example, the total population of a county library is the population of the county of which the library is an instrumentality. The revised definition also makes clear that if a public entity is an instrumentality of an independent school district, the instrumentality's population is determined by reference to the population estimate for the independent school district as calculated in the most recent Small Area Income and Poverty Estimates. The revised definition also states that the total population of the National Railroad Passenger Corporation is determined by reference to the population estimate for the United States as calculated by the United States Census Bureau in the most recent decennial Census. The revisions to the definition do not change the scope of this part or the time frames that public entities have to comply with subpart H of this part; they simply provide additional clarity for public entities on how to determine which compliance time frame applies. The Department expects that these changes will help public entities better understand the time frame in which they must begin complying with the technical standard. Further discussion of this topic, including discussion of comments, can be found in the section-by-section analysis of § 35.200, under the heading "Requirements by Entity Size."

## "User Agent"

The Department has added a definition for "user agent." The definition exactly matches the definition of "user agent" in WCAG 2.1.<sup>[13]</sup> WCAG 2.1 includes an accompanying illustration, which clarifies that the definition of "user agent" means web browsers, media players, plug-ins, and other programs—including assistive technologies—that help in retrieving, rendering, and interacting with web content.<sup>[14]</sup>

The Department added this definition to this part to ensure clarity of the term "user agent," now that the term appears in the definition of "web content." As the Department explains further in discussing the definition of "web content" in this section-by-section analysis, the Department has more closely aligned the definition of "web content" in this part with the definition in WCAG 2.1. Because this change introduced the term "user agent" into the title II regulation, and the Department does not believe this is a commonly understood term, the Department has added the definition of "user agent" provided in WCAG 2.1 to this part. One commenter suggested that the Department add this definition in this part, and the Department also believes that adding this definition in this part is consistent with the suggestions of many commenters who proposed aligning the definition of "web content" with the definition in WCAG 2.1, as explained further in the following section.

## "WCAG 2.1"

[14] *Id.*

[13] See W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/> and <https://perma.cc/UB8A-GG2F>.

The Department is including a definition of "WCAG 2.1." The term "WCAG 2.1" refers to the 2018 version of the voluntary guidelines for web accessibility, known as the Web Content Accessibility Guidelines 2.1 ("WCAG 2.1"). W3C, the principal international organization involved in developing standards for the web, published WCAG 2.1 in June 2018, and it is available at <https://www.w3.org/TR/2018/REC-WCAG21-20180605/> and <https://perma.cc/UB8A-GG2F>. WCAG 2.1 is discussed in more detail in the section-by-section analysis of § 35.200.

## "Web Content"

Section 35.104 defines "web content" as the information and sensory experience to be communicated to the user by means of a user agent, including code or markup that defines the content's structure, presentation, and interactions. Examples of web content include text, images, sounds, videos, controls, animations, and conventional electronic documents. The first sentence of the Department's definition of "web content" is aligned with the definition of "web content" in WCAG 2.1.<sup>[15]</sup> The second sentence of the definition gives examples of some of the different types of information and experiences available on the web. However, these examples are intended to illustrate the definition and not be exhaustive. The Department also notes that subpart H of this part covers the accessibility of public entities' web content regardless of whether the web content is viewed on desktop computers, laptops, smartphones, or elsewhere.

The Department slightly revised its definition from the proposed definition in the NPRM, which was based on the WCAG 2.1 definition but was slightly less technical and intended to be more easily understood by the public generally. The Department's proposed rule defined "web content" as information or sensory experience—including the encoding that defines the content's structure, presentation, and interactions—that is communicated to the user by a web browser or other software. Examples of web content include text, images, sounds, videos, controls, animations, and conventional electronic documents.<sup>[16]</sup> In this part, the first sentence of this definition is revised to provide that web content is the information and sensory experience to be communicated to the user by means of a user agent, including code or markup that defines the content's structure, presentation, and interactions. The sentence is now aligned with the WCAG 2.1 definition of web content (sometimes referred to as "content" by WCAG).<sup>[17]</sup> The Department has also added a definition of "user agent" in this part, as explained in the section-by-section analysis.

The Department decided to more closely align the definition of "web content" in this part with the definition in WCAG 2.1 to avoid confusion, to ensure consistency in the application of WCAG 2.1, and to assist technical experts in implementing subpart H of this part. Consistent with the suggestion of several commenters, the Department

<sup>[15]</sup> See W3C, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/> and <https://perma.cc/UB8A-GG2F> (see definition of "content (Web content)"). WCAG 2.1 defines "user agent" as "any software that retrieves and presents Web content for users," such as web browsers, media players, plug-ins, and assistive technologies. See W3C, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/> and <https://perma.cc/UB8A-GG2F> (see definition of "user agent").

<sup>[17]</sup> See W3C, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/> and <https://perma.cc/UB8A-GG2F>.

<sup>[16]</sup> 88 FR 52018.

believes this approach minimizes possible inadvertent conflicts between the type of content covered by the Department's regulatory text and the content covered by WCAG 2.1. Further, the Department believes it is prudent to more closely align these definitions because the task of identifying relevant content to be made accessible will often fall on technical experts. The Department believes technical experts will be familiar with the definition of "web content" in WCAG 2.1, and creating a modified definition will unnecessarily increase effort by requiring technical experts to familiarize themselves with a modified definition. The Department also understands that there are likely publicly available accessibility guidance documents and toolkits on the WCAG 2.1 definition that could be useful to public entities, and using a different definition of "web content" could call into question public entities' ability to rely on those tools, which would create unnecessary work for public entities. To incorporate this change, the Department removed language from the proposed rule addressing the encoding that defines the web content's structure, presentation, and interactions, because the Department believed the more prudent approach was to more closely align this definition with the definition in WCAG 2.1. However, the Department maintained in its final definition an additional sentence providing examples of web content to aid in the public's understanding of this definition. This may be particularly useful for members of the public without a technical background.

The Department received many comments supporting the Department's proposed definition of "web content" from public entities, disability advocates, individuals, and technical and other organizations. Many of these commenters indicated that the Department's definition was sufficiently generic and familiar to the public. The Department believes that the definition in this part aligns with these comments, since it is intended to mirror the definition in WCAG 2.1 and cover the same types of content.

Some commenters raised concerns that the scope of the definition should be broader, arguing that the definition should be extended to include "closed" systems such as kiosks, printers, and point-of-sale devices. Another organization mistakenly believed that the examples listed in the definition of "web content" were meant to be exhaustive. The Department wishes to clarify that this list is not intended to be exhaustive. The Department declines to broaden the definition of "web content" beyond the definition in this part because the Department seeks in its rulemaking to be responsive to calls from the public for the Department to provide certainty by adopting a technical standard State and local government entities must adhere to for their web content and mobile apps. The Department thus is limiting its rulemaking effort to web content and mobile apps. However, the Department notes that State and local government entities have existing accessibility obligations with respect to services, programs, or activities offered through other types of technology under title II of the Americans with Disabilities Act ("ADA") or other laws.<sup>[18]</sup> For example, "closed" systems<sup>[19]</sup> may need to be made accessible in accordance with the existing title II regulation, as public entities have ongoing responsibilities to ensure effective communication, among other requirements.

Some commenters also suggested that the Department narrow the definition of "web content." A few of these comments came from trade groups representing public accommodations, and they argued that the scope of the proposed definition would extend to content the public entity cannot control or is unable to make accessible due to other challenges. These commenters also argued that the costs of making content accessible would be extremely high for the range of content covered by the definition of "web content." The Department believes the framework in this part appropriately balances the considerations implicated by this definition. Public entities can avail themselves

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<sup>[19]</sup> A closed system, or "closed functionality," means that users cannot attach assistive technology to the system to make the content accessible, such as with a travel kiosk. See W3C, WCAG2ICT Overview, <https://www.w3.org/WAI/standards-guidelines/wcag/non-web-ict/> [<https://perma.cc/XRL6-6Q9Y>] (Feb. 2, 2024).

<sup>[18]</sup> See §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

of several exceptions that are intended to reduce the costs of making content accessible in some cases (such as the preexisting social media posts exception in § 35.201(e)), and to address instances where public entities truly do not have control over content (such as the third-party-posted content exception in § 35.201(c)). Further, public entities will be able to rely on the fundamental alteration and undue burdens limitations set out in § 35.204 where they can satisfy the requirements of those limitations, and public entities may also be able to use conforming alternate versions under § 35.202 where it is not possible to make web content directly accessible due to technical or legal limitations. The Department believes this approach appropriately balances the costs of compliance with the significant benefits to individuals with disabilities of being able to access the services, programs, and activities of their State and local government entities.

Some disability advocacy groups suggested that the Department modify the definition slightly, such as by providing for “information, sensory or otherwise” in lieu of “information and sensory experience.” The Department believes the prudent approach is to closely mirror the definition of “web content” in WCAG 2.1 to avoid confusion that could ensue from other differences between the two definitions. While the Department appreciates that there may be questions about the application of the definition to specific factual contexts, the Department believes the definition in WCAG 2.1 is sufficiently clear. The Department can provide further guidance on the application of this definition as needed.

Some commenters argued that the non-exhaustive list of examples of web content in this part would include web content that would not be considered web content under WCAG 2.1. In particular, some commenters noted that conventional electronic documents are not web content under WCAG 2.1 because they are not opened or presented through a user agent. Those commenters said that the Department's definition of “web content” should not include files such as word processor documents, presentation documents, and spreadsheets, even if they are downloaded from the web. The commenters further suggested that this part should split consideration of electronic document files from web content, similar to the approach they stated is used in the section 508 standards.<sup>[20]</sup> The Department also reviewed suggestions from commenters that the Department rely on WCAG guidance explaining how to apply WCAG to non-web information and communications technologies<sup>[21]</sup> and the ISO 14289-1 (“PDF/UA-1”)<sup>[22]</sup> standard related to PDF files. However, other commenters argued that when electronic documents are viewed in the browser window, they generally are considered web content and should thus be held to the same standard as other types of web content. Those commenters agreed with the Department's decision to include conventional electronic documents within the definition of “web content,” particularly when the version posted is not open for editing by the public.

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<sup>[22]</sup> International Organization for Standardization, *ISO 14289-1:2014; Document management applications; Electronic document file format enhancement for accessibility; Part 1: Use of ISO 32000-1 (PDF/UA-1)* (Dec. 2014), <https://www.iso.org/standard/64599.html> [<https://perma.cc/S53A-Q3Y2>]. One commenter also referred to PDF/UA-2; however, the Department's understanding is that PDF/UA-2 is still under development.

International Organization for Standardization, *ISO 14289-2; Document management applications; Electronic document file format enhancement for accessibility; Part 2: Use of ISO 32000-2 (PDF/UA-2)*, <https://www.iso.org/standard/82278.html> [<https://perma.cc/3W5L-UJ7J>].

<sup>[21]</sup> W3C, *WCAG2/ICT Overview*, <https://www.w3.org/WAI/standards-guidelines/wcag/non-web-ict/> [<https://perma.cc/XRL6-6Q9Y>] (Feb. 2, 2024).

<sup>[20]</sup> See 29 U.S.C. 794d. A discussion of the section 508 standards is included later in the section-by-section analysis, in “WCAG 2.0 and Section 508 of the Rehabilitation Act.”

The Department has considered commenters' views and determined that conventional electronic documents should still be considered web content for purposes of this part. The Department has found that public entities frequently provide their services, programs, or activities using conventional electronic documents, and the Department believes this approach will enhance those documents' accessibility, improving access for individuals with disabilities. The Department understands commenters' concerns to mean that, in applying WCAG 2.1 to conventional electronic documents, not all success criteria may be applicable directly as written. Although the Department understands that some WCAG 2.1 Level AA success criteria may not apply as written to conventional electronic documents,<sup>[23]</sup> when public entities provide or make available web content and content in mobile apps, public entities generally must ensure conformance to the WCAG 2.1 Level AA success criteria to the extent those criteria can be applied. In determining how to make conventional electronic documents conform to WCAG 2.1 Level AA, public entities may find it helpful to consult W3C's guidance on non-web information and communications technology, which explains how the WCAG success criteria can be applied to conventional electronic documents. The Department believes the compliance dates discussed in § 35.200(b) will provide public entities sufficient time to understand how WCAG 2.1 Level AA applies to their conventional electronic documents. The Department will continue to monitor developments in the accessibility of conventional electronic documents and issue further guidance as appropriate.

Finally, several commenters asked whether this definition would cover internal, non-public applications, such as web content used solely by employees. The Department reiterates that subpart H of this part includes requirements for the web content and mobile apps provided or made available by public entities within the scope of title II. While subpart H is not promulgated under title I of the ADA, it is important to note that compliance with subpart H will not relieve title II entities of their distinct employment-related obligations under title I of the ADA, which could include, for example, accommodations for a web developer with a disability working for a public entity.

## Subpart H—Web and Mobile Accessibility

The Department is creating a new subpart in its title II regulation. Subpart H of this part addresses the accessibility of public entities' web content and mobile apps.

### Section 35.200 Requirements for Web and Mobile Accessibility

#### General

<sup>[23]</sup> W3C explains in its guidance on non-web information and communications technology that “[w]hile WCAG 2.2 was designed to be technology-neutral, it assumes the presence of a ‘user agent’ such as a browser, media player, or assistive technology as a means to access web content. Therefore, the application of WCAG 2.2 to documents and software in non-web contexts require[s] some interpretation in order to determine how the intent of each WCAG 2.2 success criterion could be met in these different contexts of use.” W3C, *Guidance on Applying WCAG 2.2 to Non-Web Information and Communications Technologies (WCAG2ICT): Group Draft Note* (Aug. 15, 2023), <https://www.w3.org/TR/wcag2ict-22/> [<https://perma.cc/2PYA-4RFH>]. While this quotation addresses WCAG 2.2, the beginning of the guidance notes that “the current draft includes guidance for WCAG 2.1 success criteria.” *Id.*

Section 35.200 sets forth specific requirements for the accessibility of web content and mobile apps of public entities. Section 35.200(a) requires a public entity to ensure that the following are readily accessible to and usable by individuals with disabilities: (1) web content that a public entity provides or makes available, directly or through contractual, licensing, or other arrangements; and (2) mobile apps that a public entity provides or makes available, directly or through contractual, licensing, or other arrangements. As detailed in this section, the remainder of § 35.200 sets forth the specific standards that public entities are required to meet to make their web content and mobile apps accessible and the timelines for compliance.

## Web Content and Mobile Apps That Public Entities Provide or Make Available

Section 35.200(a) identifies the scope of content covered by subpart H of this part. Section 35.200(a)(1) and (2) applies to web content and mobile apps that a public entity provides or makes available. The Department intends the scope of § 35.200 to be consistent with the “Application” section of the existing title II regulation at § 35.102, which states that this part applies to all services, programs, and activities provided or made available by public entities. The Department therefore made minor changes to the language of § 35.200(a)(1) and (2) to make the section more consistent with § 35.102. In the NPRM, § 35.200(a)(1) and (2) applied to web content and mobile apps that a public entity makes available to members of the public or uses to offer services, programs, or activities to members of the public.<sup>[24]</sup> The Department revised § 35.200(a)(1) and (2) to apply to web content and mobile apps that a public entity provides or makes available. The Department also made corresponding revisions to the language of § 35.200(b)(1) and (2). The Department expects that public entities will be familiar with the revised language used in § 35.200(a) because it is similar to the language used in § 35.102, and that such familiarity and consistency will result in less confusion and more predictable access for individuals with disabilities to the web content and mobile apps of public entities. The Department notes that the revised language does not change or limit the coverage of subpart H as compared to the NPRM. Both the revised language and the NPRM are consistent with the broad coverage of § 35.102.

## Contractual, Licensing, and Other Arrangements

The general requirements in subpart H of this part apply to web content or mobile apps that a public entity provides or makes available directly, as well as those the public entity provides or makes available “through contractual, licensing, or other arrangements.” The Department expects that the phrase “directly or through contractual, licensing, or other arrangements” will be familiar to public entities because it comes from existing regulatory language in title II of the ADA. The section on general prohibitions against discrimination in the existing title II regulation says that a public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability engage in various forms of discrimination.<sup>[25]</sup> The Department intentionally used the same phrasing in subpart H because here too, where public entities act through third parties using contractual, licensing, or other arrangements, they are not relieved of their obligations under subpart H. For example, when public educational institutions arrange for third parties to post educational content on their behalf, public entities will still be responsible for the accessibility of that content under the ADA.

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<sup>[24]</sup> 88 FR 52018.

Further, the Department emphasizes that the phrase “provides or makes available” in § 35.200 is not intended to mean that § 35.200 only applies when the public entity creates or owns the web content or mobile app. The plain meaning of “make available” includes situations where a public entity relies on a third party to operate or furnish content. Section 35.200 means that public entities provide or make available web content and mobile apps even where public entities do not design or own the web content or mobile app, if there is a contractual, licensing, or other arrangement through which the public entity uses the web content or mobile app to provide a service, program, or activity. For example, even when a city does not design, create, or own a mobile app allowing the public to pay for public parking, when a contractual, licensing, or other arrangement exists between the city and the mobile app enabling the public to use the mobile app to pay for parking in the city, the mobile app is covered under § 35.200. This is because the public entity has contracted with the mobile app to provide access to the public entity's service, program, or activity (*i.e.*, public parking) using a mobile app. The Department believes this approach will be familiar to public entities, as it is consistent with the existing framework in title II of the ADA.<sup>[26]</sup>

The Department received many public comments in response to the NPRM expressing confusion about the extent to which content created by third parties on behalf of public entities must be made accessible. Many commenters pointed out that public entities frequently enter into contracts with vendors or other third parties to produce web content and mobile apps, such as for websites and apps used to pay fines and parking fees. Commenters were particularly concerned because the NPRM contained exceptions for third-party content, which they thought could indicate that the Department did not intend to cover any content created by third parties even when it was created on behalf of public entities. Commenters urged the Department to make clear in regulatory text that content created or provided by third-party entities is still covered by this part where those third parties are acting on behalf of a public entity.

The Department agrees with these commenters' concerns, so the Department has modified the language in subpart H of this part to make clear that the general requirements for web content and mobile app accessibility apply when the public entity provides or makes available web content or mobile apps directly or through contractual, licensing, or other arrangements. The Department inserted this language in § 35.200(a)(1) and (2) and (b)(1) and (2). The Department notes that this modification does not change the coverage of § 35.200 from the NPRM. The Department clarified in the NPRM that throughout the proposal, a public entity's “website” is intended to include not only the websites hosted by the public entity, but also websites operated on behalf of a public entity by a third party. For example, public entities sometimes use vendors to create and host their web content. The Department clarified that such content would also be covered by the proposed rule.<sup>[27]</sup> The language the Department added to the general requirements provisions in § 35.200(a)(1) and (2) and (b)(1) and (2) does not change the meaning of the provisions, but rather ensures clarity about public entities' obligations when they are acting through a third party, such as when they contract with a vendor.

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<sup>[25]</sup> Section 35.130(b)(1) and (3). See also § 35.152(a) (describing requirements for jails, detention and correctional facilities, and community correctional facilities).

<sup>[26]</sup> See § 35.130(b)(1) and (3).

<sup>[27]</sup> 88 FR 51957.

Many commenters stated their concern that public entities lack control over third-party content, even where they contract with third parties to provide that content. These commenters, generally from public entities and trade groups representing public accommodations, argued that seeking to obtain accessible third-party content provided on behalf of public entities would be challenging. Some of these commenters said that in theory this type of content could be controlled by procurement, but that this has not been realized in practice. While the Department is sympathetic to these concerns, the Department also received many comments from disability advocates and individuals with disabilities pointing out the crucial nature of services provided by third parties on behalf of public entities. For example, some disability advocates argued that State and local government entities increasingly rely on third parties to provide services such as the mapping of zoning areas and city council districts, fine payment systems, applications for reserving and paying for public parking, websites to search for available public housing, and many other examples. The Department believes individuals with disabilities should not be excluded from these government services because the services are inaccessible and are being provided by third parties on behalf of a public entity, rather than being provided directly by the public entity. Indeed, public entities have a responsibility to comply with their ADA obligations even when their services, programs, or activities are being offered through contractors. Further, while the Department understands the concerns raised by commenters that current market options make it challenging for public entities to procure accessible services, the Department expects that options for accessible third-party services will grow in response to subpart H of this part. The Department believes that more accessible options will be readily available by the time public entities are required to comply with subpart H, which will make it less difficult for public entities to procure accessible services from contractors. The Department also notes that public entities will be able to rely on the fundamental alteration and undue burdens limitations in this part in § 35.204 where they can satisfy the requirements of that provision.

Further, the Department believes that when public entities engage in contractual, licensing, or other arrangements with third parties to provide or make available web content and mobile apps, public entities can choose to work with providers who can ensure accessibility, and public entities can also include contract stipulations that ensure accessibility in third-party services. This is consistent with the existing obligations public entities face in other title II contexts where they choose to contract, license, or otherwise arrange with third parties to provide services, programs, or activities. The Department acknowledges that some commenters argued that they face limited existing options in procurement for accessible third-party services. However, where such circumstances warrant, public entities can rely on the undue burdens provision when they can satisfy its requirements. In addition, the Department expects that options for procuring accessible third-party services will grow in response to its rulemaking.

## Background on WCAG

Since 1994, W3C has been the principal international organization involved in developing protocols and guidelines for the web.<sup>[28]</sup> W3C develops a variety of voluntary technical standards and guidelines, including ones relating to privacy, internationalization of technology, and—relevant here—accessibility. W3C's Web Accessibility Initiative ("WAI") has developed voluntary guidelines for web accessibility, known as WCAG, to help web developers create web content that is accessible to individuals with disabilities.<sup>[29]</sup>

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<sup>[29]</sup> The Department received one comment arguing that the process by which WCAG is developed is not equitable or inclusive of members of the disability community. The Department received another comment commending the Department for adopting WCAG as the technical standard and noting that WCAG is

The first version of WCAG, WCAG 1.0, was published in 1999. WCAG 2.0 was published in December 2008, and is available at <http://www.w3.org/TR/2008/REC-WCAG20-20081211/> [<https://perma.cc/L2NH-VLCR>]. WCAG 2.0 was approved as an international standard by the International Organization for Standardization ("ISO") and the International Electrotechnical Commission ("IEC") in October 2012.<sup>[30]</sup> WCAG 2.1 was published in June 2018, and is available at <https://www.w3.org/TR/2018/REC-WCAG21-20180605/> and <https://perma.cc/UB8A-GG2F>.<sup>[31]</sup> WCAG 2.1 is built on and is backwards compatible with WCAG 2.0.<sup>[32]</sup> In fact, 38 of the 50 Level A and AA success criteria in WCAG 2.1 are also included in WCAG 2.0.<sup>[33]</sup>

WCAG 2.1 contains four principles that provide the foundation for web accessibility: the web content must be perceivable, operable, understandable, and robust.<sup>[34]</sup> Testable success criteria (*i.e.*, requirements for web accessibility that are measurable) are provided "to be used where requirements and conformance testing are necessary such as in design specification, purchasing, *regulation* and contractual agreements."<sup>[35]</sup> Thus, WCAG 2.1 contemplates establishing testable success criteria that could be used in regulatory efforts such as this one.

## Technical Standard—WCAG 2.1 Level AA

Section 35.200 requires that public entities' web content and mobile apps conform to WCAG 2.1 Level AA unless compliance would result in a fundamental alteration or undue financial and administrative burdens. As previously mentioned, WCAG 2.1 was published in June 2018 and is available at <https://www.w3.org/TR/2018/REC->

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developed through an open, transparent, multi-stakeholder consensus process. The Department carefully considered these comments and concluded that it is appropriate to adopt a consensus standard promulgated by W3C with input from various stakeholders, which is also consistent with the NTTAA. Information from W3C about its process for developing standards is available at W3C, Web Accessibility Initiative, *How WAI Develops Accessibility Standards Through the W3C Process: Milestones and Opportunities To Contribute* (Sept. 2006), <https://www.w3.org/WAI/standards-guidelines/w3c-process/> [<https://perma.cc/3BED-RCJP>] (Nov. 2, 2020).

<sup>[28]</sup> W3C, *About Us*, <https://www.w3.org/about/> [<https://perma.cc/TQ2W-T377>].

<sup>[33]</sup> See *id.*

<sup>[32]</sup> W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, 0.5 Comparison with WCAG 2.0* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#comparison-with-wcag-2-0> [<https://perma.cc/H76F-6L27>].

<sup>[31]</sup> The WAI also published some revisions to WCAG 2.1 on September 21, 2023. W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (Sept. 21, 2023), <https://www.w3.org/TR/WCAG21/> [<https://perma.cc/4VF7-NF5F>]; see *infra* note 47. The WAI also published a working draft of WCAG 3.0 in December 2021. W3C, *W3C Accessibility Guidelines (WCAG) 3.0*, <https://www.w3.org/TR/wcag-3.0/> (July 24, 2023) [<https://perma.cc/7FPQ-EEJ7>].

<sup>[30]</sup> W3C, *Web Content Accessibility Guidelines 2.0 Approved as ISO/IEC International Standard* (Oct. 15, 2012), <https://www.w3.org/press-releases/2012/wcag2pas/> [<https://perma.cc/JQ39-HGKQ>].

<sup>[35]</sup> *Id.* (*emphasis added*).

<sup>[34]</sup> See W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, WCAG 2 Layers of Guidance* (Sept. 21, 2023), <https://www.w3.org/TR/WCAG21/#wcag-2-layers-of-guidance> [<https://perma.cc/5PDG-ZTJE>].

WCAG21-20180605/ and <https://perma.cc/UB8A-GG2F>. To the extent there are differences between WCAG 2.1 Level AA and the standards articulated in this part, the standards articulated in this part prevail. WCAG 2.1 Level AA is not restated in full in this part but is instead incorporated by reference.

In the NPRM, the Department solicited feedback on the appropriate technical standard for accessibility for public entities' web content and mobile apps. The Department received many public comments from a variety of interested parties in response. After consideration of the public comments and after its independent assessment, the Department determined that WCAG 2.1 Level AA is the appropriate technical standard for accessibility to adopt in subpart H of this part. WCAG 2.1 Level AA includes success criteria that are especially helpful for people with disabilities using mobile devices, people with low vision, and people with cognitive or learning disabilities.<sup>[36]</sup>

Support for WCAG 2.1 Level AA as the appropriate technical standard came from a variety of commenters.

Commenters supporting the adoption of WCAG 2.1 Level AA noted that it is a widely used and accepted industry standard. At least one such commenter noted that requiring conformance to WCAG 2.1 Level AA would result in a significant step forward in ensuring access for individuals with disabilities to State and local government entities' web content and mobile apps. Commenters noted that WCAG 2.1 Level AA has been implemented, tested, and shown to be a sound and comprehensive threshold for public agencies. In addition, because WCAG 2.1 Level AA was published in 2018, web developers and public entities have had time to familiarize themselves with it. The WCAG standards were designed to be "technology neutral."<sup>[37]</sup> This means that they are designed to be broadly applicable to current and future web technologies.<sup>[38]</sup> Thus, WCAG 2.1 also allows web and mobile app developers flexibility and potential for innovation.

The Department expects that adopting WCAG 2.1 Level AA as the technical standard will have benefits that are important to ensuring access for individuals with disabilities to public entities' services, programs, and activities. For example, WCAG 2.1 Level AA requires that text be formatted so that it is easier to read when magnified.<sup>[39]</sup> This is important, for example, for people with low vision who use magnifying tools. Without the formatting that WCAG 2.1 Level AA requires, a person magnifying the text might find reading the text disorienting because they might have to scroll horizontally on every line.<sup>[40]</sup>

WCAG 2.1 Level AA also includes success criteria addressing the accessibility of mobile apps or web content viewed on a mobile device. For example, WCAG 2.1 Level AA Success Criterion 1.3.4 requires that page orientation (i.e., portrait or landscape) not be restricted to just one orientation, unless a specific display orientation is essential.<sup>[41]</sup> This feature is important, for example, for someone who uses a wheelchair with a tablet attached to it such that

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<sup>[38]</sup> See W3C, *Understanding Techniques for WCAG Success Criteria*, <https://www.w3.org/WAI/WCAG21/Understanding/understanding-techniques> [<https://perma.cc/AMT4-XAAL>] (June 20, 2023).

<sup>[37]</sup> W3C, *Introduction to Understanding WCAG*, <https://www.w3.org/WAI/WCAG21/Understanding/intro> [<https://perma.cc/XB3Y-QKVU>] (June 20, 2023).

<sup>[36]</sup> W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, 0.5 Comparison with WCAG 2.0* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#comparison-with-wcag-2-0> [<https://perma.cc/H76F-6L27>].

<sup>[40]</sup> See *id.*

<sup>[39]</sup> See W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 1.4.10 Reflow* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#reflow> [<https://perma.cc/TU9U-C8K2>].

the tablet cannot be rotated.<sup>[42]</sup> If web content or mobile apps only work in one orientation, they will not always work for this individual depending on how the tablet is oriented, which could render that content or app unusable for the person.<sup>[43]</sup> Another WCAG 2.1 success criterion requires, in part, that if a function in an app can be operated by motion—for example, shaking the device to undo typing—that there be an option to turn off that motion sensitivity.<sup>[44]</sup> This could be important, for example, for someone who has tremors, so that they do not accidentally undo their typing.<sup>[45]</sup>

Such accessibility features are critical for individuals with disabilities to have equal access to their State or local government entity's services, programs, and activities. This is particularly true given that using mobile devices to access government services is commonplace. For example, one source notes that mobile traffic generally accounts for 58.21 percent of all internet usage.<sup>[46]</sup> In addition, WCAG 2.1 Level AA's incorporation of mobile-related criteria is important because of public entities' increasing use of mobile apps in offering their services, programs, or activities. Public entities are using mobile apps to offer a range of critical government services—from providing traffic information, to scheduling trash pickup, to making vaccination appointments.

The Department also understands that public entities are likely already familiar with WCAG 2.1 Level AA or will be able to become familiar quickly. This is because WCAG 2.1 Level AA has been available since 2018,<sup>[47]</sup> and it builds upon WCAG 2.0, which has been in existence since 2008 and has been established for years as a benchmark for accessibility. According to the Department's research, WCAG 2.1 is already being increasingly used by members of the public and State and local government entities. At least ten States now use, or aim to use, WCAG 2.1 as a standard for their websites, indicating increased familiarity with and use of the standard. In fact, as commenters also noted, the Department recently included WCAG 2.1 in several settlement agreements with covered entities addressing inaccessible websites.<sup>[48]</sup>

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<sup>[45]</sup> See W3C, *What's New in WCAG 2.1*, <https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/> [<https://perma.cc/W8HK-Z5QK>] (Oct. 5, 2023).

<sup>[44]</sup> See W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 2.5.4 Motion Actuation* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#motion-actuation> [<https://perma.cc/D3PS-32NV>].

<sup>[43]</sup> See *id.*

<sup>[42]</sup> W3C, *What's New in WCAG 2.1*, <https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/> [<https://perma.cc/S7VS-J6E4>] (Oct. 5, 2023).

<sup>[46]</sup> Andrew Buck, MobiLoud, *What Percentage of internet Traffic is Mobile?*, <https://www.mobiloard.com/blog/what-percentage-of-internet-traffic-is-mobile#what-percentage-of-internet-traffic-comes-on-mobile-devices> [<https://perma.cc/2FK6-UDD5>] (Feb. 7, 2024).

<sup>[48]</sup> See, e.g., Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and CVS Pharmacy, Inc. (Apr. 11, 2022), [https://www.ada.gov/cvs\\_sa.pdf](https://www.ada.gov/cvs_sa.pdf) [<https://perma.cc/H5KZ-4VVF>]; Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Meijer, Inc. (Feb. 2, 2022), [https://www.ada.gov/meijer\\_sa.pdf](https://www.ada.gov/meijer_sa.pdf) [<https://perma.cc/5FGD-FK42>]; Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and the Kroger Co. (Jan. 28, 2022), [https://www.ada.gov/kroger\\_co\\_sa.pdf](https://www.ada.gov/kroger_co_sa.pdf) [<https://perma.cc/6ASX-U7FQ>]; Settlement Agreement Between the United States of America and the Champaign-Urbana Mass Transit District

The Department expects, and heard in public comments, that web developers and professionals who work for or with public entities are likely to be familiar with WCAG 2.1 Level AA. And the Department believes that if public entities and associated web developers are not already familiar with WCAG 2.1 Level AA, they are at least likely to be familiar with WCAG 2.0 and will be able to become acquainted quickly with WCAG 2.1's 12 additional Level A and AA success criteria. The Department also believes that resources, like trainings and checklists, exist to help public entities implement or understand how to implement not only WCAG 2.0 Level AA, but also WCAG 2.1 Level AA.<sup>[49]</sup> Additionally, public entities will have two or three years, depending on population size, to come into compliance with subpart H of this part. Therefore, public entities and web professionals who are not already familiar with WCAG 2.1 will have time to familiarize themselves and plan to ensure that they will be in compliance with the rule when required.

## Alternative Approaches Considered

(Dec. 14, 2021), [https://www.justice.gov/d9/case-documents/attachments/2021/12/14/champaign-urbana\\_sa.pdf](https://www.justice.gov/d9/case-documents/attachments/2021/12/14/champaign-urbana_sa.pdf) [<https://perma.cc/66XY-QGA8>]; Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Hy-Vee, Inc. (Dec. 1, 2021), [https://www.ada.gov/hy-vee\\_sa.pdf](https://www.ada.gov/hy-vee_sa.pdf) [<https://perma.cc/GFY6-BJNE>]; Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and Rite Aid Corp. (Nov. 1, 2021), [https://www.ada.gov/rite\\_aid\\_sa.pdf](https://www.ada.gov/rite_aid_sa.pdf) [<https://perma.cc/4HBF-RBK2>].

<sup>[47]</sup> The WAI published some revisions to WCAG 2.1 on September 21, 2023. See W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (Sept. 21, 2023), <https://www.w3.org/TR/WCAG21/> [<https://perma.cc/4VF7-NF5F>]. However, for the reasons discussed in this section, subpart H of this part requires conformance to the version of WCAG 2.1 that was published in 2018. W3C, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/> and <https://perma.cc/UB8A-GG2F>. The Department believes that public entities have not had sufficient time to become familiar with the 2023 version. Public entities and others also may not have had an adequate opportunity to comment on whether the Department should adopt the 2023 version, which was published shortly before the comment period on the NPRM closed on October 3, 2023. One recent revision to WCAG 2.1 relates to Success Criterion 4.1.1, which addresses parsing. W3C has described Success Criterion 4.1.1 as “obsolete” and stated that it “is no longer needed for accessibility.” W3C, *WCAG 2 FAQ*, <https://www.w3.org/WAI/standards-guidelines/wcag/faq/#parsing411> [<https://perma.cc/24FK-V8LS>] (Oct. 5, 2023). According to the 2023 version of WCAG, Success Criterion 4.1.1 “should be considered as always satisfied for any content using HTML or XML.” W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (Sept. 21, 2023), <https://www.w3.org/TR/WCAG21/> [<https://perma.cc/4VF7-NF5F>]. The Department believes that either adopting this note from the 2023 version of WCAG or not requiring conformance to Success Criterion 4.1.1 is likely to create significant confusion. And although Success Criterion 4.1.1 has been removed from WCAG 2.2, the Department has decided not to adopt WCAG 2.2 for the reasons described herein. W3C, *WCAG 2 FAQ*, <https://www.w3.org/WAI/standards-guidelines/wcag/faq/#parsing411> [<https://perma.cc/45DS-RRYS>] (Oct. 5, 2023). Therefore, conformance to Success Criterion 4.1.1 is still required by subpart H of this part. Public entities that do not conform to Success Criterion 4.1.1 would nonetheless be able to rely on § 35.205 to satisfy their obligations under § 35.200 if the failure to conform to Success Criterion 4.1.1 would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app in the manner described in that section. The Department expects that this provision will help public entities avoid any unnecessary burden that might be imposed by Success Criterion 4.1.1.

<sup>[49]</sup> See, e.g., W3C, *Tutorials*, <https://www.w3.org/WAI/tutorials/> [<https://perma.cc/SW5E-WWXXV>] (Feb. 16, 2023).

## WCAG 2.2

Commenters suggested that the Department adopt WCAG 2.2 as the technical standard. WCAG 2.2 was published as a candidate recommendation—a prefinalization stage—in May 2023, and was published in final form on October 5, 2023, which was after the NPRM associated with the final rule was published and after the comment period closed.<sup>[50]</sup> Commenters who supported the adoption of WCAG 2.2 noted that it was likely to be finalized before the final rule would be published. All of the WCAG 2.0 and WCAG 2.1 success criteria except for one are included in WCAG 2.2.<sup>[51]</sup> WCAG 2.2 also includes six additional Level A and AA success criteria beyond those included in WCAG 2.1.<sup>[52]</sup> Commenters supporting the adoption of WCAG 2.2 noted that WCAG 2.2's additional success criteria are important for ensuring accessibility; for example, WCAG 2.2 includes additional criteria that are important for people with cognitive disabilities or for those accessing content via mobile apps. Like WCAG 2.1, WCAG 2.2's additional success criteria offer particular benefits for individuals with low vision, limited manual dexterity, and cognitive disabilities. For example, Success Criterion 3.3.8, which is a new criterion under WCAG 2.2, improves access for people with cognitive disabilities by limiting the use of cognitive function tests, like solving puzzles, in authentication processes.<sup>[53]</sup> Some commenters also suggested that the few additional criteria in WCAG 2.2 would not pose a substantial burden for web developers, who are likely already familiar with WCAG 2.1.

Some commenters suggested that WCAG 2.1 would become outdated once WCAG 2.2 was finalized. And because WCAG 2.2 was adopted more recently than WCAG 2.1, some commenters noted that the adoption of WCAG 2.2 would be more likely to help subpart H of this part keep pace with changes in technology. The Department understands and appreciates the concerns commenters raised.

The Department believes that adopting WCAG 2.1 as the technical standard rather than WCAG 2.2 is the most prudent approach at this time. W3C, while recommending the use of the most recent recommended standard, has made clear that WCAG 2.2 does not “deprecate or supersede” WCAG 2.1 and has stated that WCAG 2.1 is still an existing standard.<sup>[54]</sup> The Department recognizes that WCAG 2.2 is a newer standard, but in crafting subpart H of this part the Department sought to balance benefits for individuals with disabilities with feasibility for public entities making their content accessible in compliance with subpart H. Because WCAG 2.2 has been adopted so recently, web professionals have had less time to become familiar with the additional success criteria that have been incorporated in WCAG 2.2. The Department believes there will be fewer resources and less guidance available to web professionals and public entities on the new success criteria in WCAG 2.2. Additionally, the Department appreciates the concerns expressed by at least one commenter with adopting any standard that was not finalized before the NPRM's comment period—as was the case with WCAG 2.2—because interested parties would not have had an opportunity to understand and comment on the finalized standard.

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[53] *Id.*

[52] *Id.*

[51] W3C, *What's New in WCAG 2.2*, <https://www.w3.org/WAI/standards-guidelines/wcag/new-in-22/> [<https://perma.cc/GDM3-A6SE>] (Oct. 5, 2023).

[50] W3C, *WCAG 2 Overview*, <https://www.w3.org/WAI/standards-guidelines/wcag/> [<https://perma.cc/RQS2-P7JC>] (Oct. 5, 2023).

Given the benefits of WCAG 2.2 highlighted by commenters, some public entities might choose to implement WCAG 2.2 to provide an even more accessible experience for individuals with disabilities and to increase customer service satisfaction. The Department notes that subpart H of this part provides for equivalent facilitation in § 35.203, meaning public entities could choose to comply with subpart H by conforming their web content to WCAG 2.2 Level AA because WCAG 2.2 Level AA provides substantially equivalent or greater accessibility and usability as compared to WCAG 2.1 Level AA. This would be sufficient to meet the standard for equivalent facilitation in § 35.203, which is discussed in more detail later in the section-by-section analysis.

## WCAG 2.0 and Section 508 of the Rehabilitation Act

Alternatively, the Department considered adopting WCAG 2.0. This change was suggested by the Small Business Administration, which argued that public entities should not have to comply with a more rigorous standard for online accessibility than the Federal Government, which is required to conform to WCAG 2.0 under section 508 of the Rehabilitation Act. In 2017, when the Architectural and Transportation Barriers Compliance Board ("Access Board") adopted WCAG 2.0 as the technical standard for the Federal Government's web content under section 508, WCAG 2.1 had not been finalized.<sup>[55]</sup> And although WCAG 2.0 is the standard adopted by the Department of Transportation in its regulations implementing the Air Carrier Access Act, which covers airlines' websites and kiosks,<sup>[56]</sup> those regulations—like the section 508 rule—were promulgated before WCAG 2.1 was published.

The Department believes that adopting WCAG 2.1 as the technical standard for subpart H of this part is more appropriate than adopting WCAG 2.0. WCAG 2.1 provides for important accessibility features that are not included in WCAG 2.0, and an increasing number of governmental entities are using WCAG 2.1. A number of countries that have adopted WCAG 2.0 as their standard are now making efforts to move or have moved to WCAG 2.1.<sup>[57]</sup> In countries that are part of the European Union, public sector websites and mobile apps generally must meet a technical standard that requires conformance to the WCAG 2.1 success criteria.<sup>[58]</sup> And WCAG 2.0 is likely to become outdated or less relevant more quickly than WCAG 2.1. As discussed previously in this appendix, WCAG 2.2 was recently published and includes even more success criteria for accessibility.

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<sup>[54]</sup> W3C, WCAG 2 Overview, <https://www.w3.org/WAI/standards-guidelines/wcag/#:~:text=WCAG%202.0%2C%20WCAG%202.1%2C%20and%20WCAG%202.2%20are%20all%20existing,most%20recent> [https://perma.cc/V5ZC-BF8Z] (Oct. 5, 2023).

<sup>[55]</sup> See 14 CFR 382.43(c) through (e) and 382.57.

<sup>[56]</sup> See *Information and Communication Technology (ICT) Standards and Guidelines*, 82 FR 5790, 5791 (Jan. 18, 2017); W3C, *Web Content Accessibility Guidelines (WCAG) 2.1* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/> and <https://perma.cc/UB8A-GG2F>.

<sup>[58]</sup> European Comm'n, *Web Accessibility*, <https://digital-strategy.ec.europa.eu/en/policies/web-accessibility> [https://perma.cc/LSG9-XW7L] (Oct. 10, 2023); European Telecomm. Standards Inst., *Accessibility Requirements for ICT Products and Services 45-51, 64-78* (Mar. 2021), [https://www.etsi.org/deliver/etsi\\_en/301500\\_301599/301549/03.02.01\\_60/en\\_301549v030201p.pdf](https://www.etsi.org/deliver/etsi_en/301500_301599/301549/03.02.01_60/en_301549v030201p.pdf) [https://perma.cc/5TEZ-9GC6].

<sup>[57]</sup> See, e.g., Austl. Gov't Digital Transformation Agency, *Exploring WCAG 2.1 for Australian Government Services* (Aug. 22, 2018), <https://www.dta.gov.au/blogs/exploring-wcag-21-australian-government-services>. A Perma archive link was unavailable for this citation. See also W3C, *Denmark (Danmark)*, <https://www.w3.org/WAI/>

The Department expects that the wide usage of WCAG 2.0 lays a solid foundation for public entities to become familiar with and implement WCAG 2.1's additional Level A and AA criteria. According to the Department's research, dozens of States either use or strive to use WCAG 2.0 or greater—either on their own or by way of implementing the section 508 technical standards—for at least some of their web content. It appears that at least ten States—Alaska, Delaware, Georgia, Louisiana, Massachusetts, Oregon, Pennsylvania, South Dakota, Utah, and Washington—already either use WCAG 2.1 or strive to use WCAG 2.1 for at least some of their web content. Given that WCAG 2.1 is a more recent standard than WCAG 2.0, adds some important criteria for accessibility, and has been in existence for long enough for web developers and public entities to get acquainted with it, the Department views it as more appropriate for adoption in subpart H of this part than WCAG 2.0. In addition, even to the extent public entities are not already acquainted with WCAG 2.1, those entities will have two or three years to come into compliance with subpart H, which should also provide sufficient time to become familiar with and implement WCAG 2.1. The Department also declines to adopt the Access Board's section 508 standards, which are harmonized with WCAG 2.0, for the same reasons it declines to adopt WCAG 2.0.

## Effective Communication and Performance Standards

Some commenters suggested that the Department should require public entities to ensure that they are meeting title II's effective communication standard—which requires that public entities ensure that their communications with individuals with disabilities are as effective as their communications with others<sup>59</sup>—rather than requiring compliance with a specific technical standard for accessibility. One such commenter also suggested that the Department rely on conformance to WCAG only as a safe harbor—as a way to show that the entity complies with the effective communication standard. The Department believes that adopting into subpart H of this part the effective communication standard, which is already required under the existing title II regulation,<sup>[60]</sup> would not meaningfully help ensure access for individuals with disabilities or provide clarity for public entities in terms of what specifically public entities must do to ensure that their web content and mobile apps are accessible. As previously mentioned, WCAG 2.1 Level AA provides specific, testable success criteria. As noted in section III.D.4 of the preamble to the final rule, relying solely on the existing title II obligations and expecting entities to voluntarily comply has proven insufficient. In addition, using the technical standard only as a safe harbor would pose similar issues in terms of clarity and would not result in reliability and predictability for individuals with disabilities seeking to access, for example, critical government services that public entities have as part of their web content and mobile apps.

Commenters also suggested that manual testing by individuals with disabilities be required to ensure that content is accessible to them. Although subpart H of this part does not specifically require manual testing by individuals with disabilities because requiring such testing could pose logistical or other hurdles, the Department recommends that public entities seek and incorporate feedback from individuals with disabilities on their web content and mobile apps. Doing so will help ensure that everyone has access to critical government services.

The Department received some comments recommending that the Department adopt a performance standard instead of a specific technical standard for accessibility of web content and mobile apps. Performance standards establish general expectations or goals for web and mobile app accessibility and allow for compliance via a variety

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*policies/denmark/#bekendtg%C3%B8relse-om-afgivelse-af-tilg%C3%A6ngelighedserkl%C3%A6ring-for-offentlige-organers-websteder-og-mobilapplikationer* [<https://perma.cc/K8BM-4QN8>] (Mar. 15, 2023); see also W3C, *Web Accessibility Laws & Policies*, <https://www.w3.org/WAI/policies/> [<https://perma.cc/6SU3-3VR3>] (Dec. 2023).

<sup>[60]</sup> *Id.*

of unspecified methods. As commenters explained, performance standards could provide greater flexibility in ensuring accessibility as web and mobile app technologies change. However, as the Department noted in the NPRM,<sup>[61]</sup> the Department believes that performance standards are too vague and subjective and could be insufficient to provide consistent and testable requirements for web and mobile app accessibility. Additionally, the Department expects that performance standards would not result in predictability for either public entities or individuals with disabilities in the way that a more specific technical standard would. Further, similar to a performance standard, WCAG has been designed to allow for flexibility and innovation as technology evolves.<sup>[62]</sup> The Department recognizes the importance of adopting a standard for web and mobile app accessibility that provides not only specific and testable requirements, but also sufficient flexibility to develop accessibility solutions for new technologies. The Department believes that WCAG achieves this balance because it provides flexibility similar to a performance standard, but it also provides more clarity, consistency, predictability, and objectivity. Using WCAG also enables public entities to know precisely what is expected of them under title II, which may be of particular benefit to entities with less technological experience. This will assist public entities in identifying and addressing accessibility errors, which may reduce costs they would incur without clear expectations.

## Evolving Standard

Other commenters suggested that the Department take an approach in the final rule whereby public entities would be required to comply with whatever is the most recent version of WCAG at the time. Under that approach, the required technical standard would automatically update as new versions of WCAG are published in the future. These commenters generally argued that such an approach would aid in “future proofing” subpart H of this part to help it keep up with changes in technology. Based on several legal considerations, the Department will not adopt such an approach. First, the Department is incorporating WCAG 2.1 Level AA by reference into subpart H and must abide by the Office of the Federal Register’s regulation regarding incorporation by reference.<sup>[63]</sup> The regulation states that incorporation by reference of a publication is limited to the edition of the publication that is approved by the Office of the Federal Register. Future amendments or revisions of the publication are not included.<sup>[64]</sup> Accordingly, the Department only incorporates a particular version of the technical standard and does not state that future versions of WCAG would be automatically incorporated into subpart H. In addition, the Department has concerns about regulating to a future standard of WCAG that has yet to be created, of which the Department has no knowledge, and for which compatibility with the ADA and covered entities’ content is uncertain.

Relatedly, the Department also received comments suggesting that it institute a process for reviewing and revising its regulation every several years to ensure that subpart H of this part is up to date and effective for current technology. Pursuant to Executive Order 13563, the Department is already required to do a periodic retrospective review of its regulations to determine whether any such regulations should be modified, streamlined, expanded, or

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<sup>[62]</sup> W3C, *Benefits of Web Content Accessibility Guidelines WCAG 2*, [https://www.w3.org/WAI/presentations/WCAG20\\_benefits/WCAG20\\_benefits.html](https://www.w3.org/WAI/presentations/WCAG20_benefits/WCAG20_benefits.html) [<https://perma.cc/3RTN-FLKV>] (Aug. 12, 2010) (“WCAG 2 is adaptable and flexible, for different situations, and developing technologies and techniques. We described earlier how WCAG 2 is flexible to apply to Web technologies now and in the future.”).

<sup>[61]</sup> 88 FR 51962.

<sup>[64]</sup> *Id.*

<sup>[63]</sup> See 1 CFR 51.1(f).

repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.<sup>[65]</sup> Consideration of the effectiveness of subpart H of this part in the future would fall within Executive Order 13563's purview, such that building a mechanism into subpart H is not necessary at this time.

## Alternative Approaches Considered for Mobile Apps and Conventional Electronic Documents

Section 35.200 adopts WCAG 2.1 Level AA as the technical standard for mobile apps. This approach will ensure the accessibility standards for mobile apps in subpart H of this part are consistent with the accessibility standards for web content in subpart H. The NPRM asked for feedback on the appropriate technical standard for mobile apps, including whether the Department should adopt WCAG 2.1 Level AA or other standards like the standards for section 508 of the Rehabilitation Act ("Section 508 Standards"), which apply to the Federal Government's web content and mobile apps.<sup>[66]</sup> The Department received several comments on the technical standard that should apply to mobile apps. Some commenters supported adopting WCAG 2.1 Level AA, some suggested adopting other technical standards or requirements, and others suggested that some WCAG success criteria may not apply to mobile apps.

Some commenters had concerns about the costs and burdens associated with applying any technical standard to content on mobile apps, including to content in mobile apps that public entities already provide on the web. One commenter requested that the Department apply WCAG 2.0 to the extent that a public entity's mobile app provides different content than is available online.

However, many commenters expressed strong support for applying the same technical standard for mobile apps and web content and shared that web content and mobile apps generally should not be treated differently. These commenters emphasized the importance of mobile app accessibility, explaining that many individuals rely on mobile apps to get information about State or local government services, programs, or activities, including transportation information, emergency alerts or special news bulletins, and government appointments. Some commenters further clarified that adopting different standards for mobile apps than web content could cause confusion. They also stated that adopting the same standard would ensure a uniform experience and expectations for users with disabilities.

Many commenters, including disability advocacy organizations, individuals, and public entities, supported the use of WCAG 2.1 Level AA as the technical standard for mobile apps, in part because WCAG is internationally recognized, often adopted in practice, and technology neutral (*i.e.*, it applies to both web content and mobile apps). Other commenters said that WCAG 2.1 Level AA is an appropriate standard for mobile apps because it includes specific success criteria aimed at addressing the unique challenges of mobile app accessibility.

Some commenters suggested that the Department should adopt WCAG 2.2 as the technical standard for mobile apps. These commenters explained that WCAG 2.2 is more recent and includes newer guidelines based on accessibility issues found in smartphones. Commenters further shared that WCAG 2.2 can better ensure adequate button size and spacing to accommodate users with varying degrees of motor skills in their fingers.

<sup>[65]</sup> E.O. 13563, sec. 6, 3 CFR, 2012 Comp., p. 215.

<sup>[66]</sup> 36 CFR 1194.1; 36 CFR part 1194, appendices A, C, and D.

In addition, other commenters recommended that the Department adopt the Section 508 Standards, either independently or together with WCAG 2.1 or WCAG 2.2. Some of these commenters shared their belief that WCAG was developed more for web content than for mobile apps. These commenters stated that while many of WCAG's principles and guidelines can be applied to mobile apps, mobile apps have unique characteristics and interactions that may require additional considerations and depend on the specific requirements and goals of the mobile app in question. For example, commenters indicated that mobile apps may also need to adhere to platform-specific accessibility guidelines for iOS (Apple) and Android (Google). In addition, commenters noted that the Section 508 Standards include additional requirements applicable to mobile apps that are not included in WCAG 2.1 Level AA, such as interoperability requirements to ensure that a mobile app does not disrupt a mobile device's internal assistive technology for individuals with disabilities (e.g., screen readers for people who are blind or have low vision). Some commenters suggested that the Department include these additional requirements from the Section 508 Standards in subpart H of this part.

The Department carefully considered all of these comments and agrees with commenters who stated that the same technical standard for accessibility should apply to both web content and mobile apps. The Department believes that applying the same technical standard to both web content and mobile apps will reduce confusion by ensuring consistent requirements and user experiences across web and mobile platforms.

The Department further agrees with the commenters who stated that WCAG 2.1 Level AA is an appropriate technical standard. As discussed previously in this appendix, many developers and organizations are already familiar with WCAG 2.1 Level AA, and they may be less familiar with WCAG 2.2. The Department thus believes that selecting WCAG 2.1 Level AA as the technical standard for mobile apps will reduce the difficulty of complying with subpart H of this part by adopting a well-recognized standard that is already familiar to developers and organizations, while still ensuring increased accessibility and usability for individuals with disabilities. The Department notes that subpart H allows for equivalent facilitation in § 35.203, meaning that public entities could still choose to apply additional standards or techniques related to mobile apps, to the extent that the standard or technique results in substantially equivalent or greater accessibility and usability.

As commenters noted, WCAG 2.1 is designed to be technology neutral, which will help ensure accessibility for mobile apps. Although the Section 508 Standards include some additional requirements like interoperability that are not required by WCAG,<sup>[67]</sup> WCAG 2.1 Level AA includes specific success criteria related to mobile app accessibility. These success criteria address challenges such as touch target size, orientation, and motion actuation, among others.<sup>[68]</sup> Therefore, the Department believes that WCAG 2.1 Level AA is a robust framework for mobile app accessibility.

The Department also received comments indicating that certain requirements under WCAG 2.1 Level AA may not be applicable to mobile apps or conventional electronic documents and subpart H of this part should therefore set forth exceptions for those success criteria. The Access Board faced similar concerns when it promulgated its Section 508 Standards.<sup>[69]</sup> Accordingly, the Section 508 Standards indicate that "non-Web documents" and "non-Web software," which include conventional electronic documents and mobile apps, do not have to comply with the following WCAG 2.0 Success Criteria: 2.4.1 Bypass Blocks, 2.4.5 Multiple Ways, 3.2.3 Consistent Navigation, and

<sup>[68]</sup> W3C, Web Content Accessibility Guidelines (WCAG) 2.1 (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/> and <https://perma.cc/UB8A-GG2F> (success criteria 2.5.5, 1.3.4, & 2.5.4).

<sup>[67]</sup> See 36 CFR 1194.1; 36 CFR part 1194, appendix C, ch. 5.

3.2.4 Consistent Identification.<sup>[70]</sup> W3C has provided guidance on how these and other WCAG success criteria can be applied to non-web information and communications technologies, including conventional electronic documents and mobile apps.<sup>[71]</sup>

The Department understands that some WCAG 2.1 Level AA success criteria may not apply to conventional electronic documents and mobile apps directly as written, but the Department declines to set forth exceptions to these success criteria in subpart H of this part. As discussed, the Department believes it is important to apply one consistent standard to web content and mobile apps to ensure clarity and reduce confusion. Public entities generally must ensure that the web content and content in mobile apps they provide or make available conform to the WCAG 2.1 Level AA success criteria, to the extent those criteria can be applied. In determining how to make conventional electronic documents and mobile apps conform to WCAG 2.1 Level AA, public entities may wish to consult W3C's guidance on non-web information and communications technology, which explains how the WCAG success criteria can be applied to conventional electronic documents and mobile apps.<sup>[72]</sup> The Department believes the compliance dates discussed in § 35.200 will provide public entities sufficient time to understand how WCAG 2.1 Level AA applies to their conventional electronic documents and mobile apps, especially because WCAG 2.1 has been in final form since 2018, which has provided time for familiarity and resources to develop. Further, the Department will continue to monitor developments in the accessibility of conventional electronic documents and mobile apps and may issue further guidance as appropriate.

## Alternative Approaches Considered for PDF Files and Digital Textbooks

The Department also received a comment suggesting that subpart H of this part reference PDF/UA-1 for standards related to PDF files or W3C's EPUB Accessibility 1.1 standard<sup>[73]</sup> for digital textbooks. The Department declines to adopt additional technical standards for these specific types of content. As discussed, the WCAG standards were designed to be "technology neutral"<sup>[74]</sup> and are designed to be broadly applicable to current and future web technologies.<sup>[75]</sup> The Department is concerned that adopting multiple technical standards related to different types of web content and content in mobile apps could lead to confusion. However, the Department notes that subpart H

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<sup>[71]</sup> W3C, WCAG2/ICT Overview, <https://www.w3.org/WAI/standards-guidelines/wcag/non-web-ict/> [<https://perma.cc/XRL6-6Q9Y>] (Feb. 2, 2024).

<sup>[70]</sup> *Id.* at 5799.

<sup>[69]</sup> See *Information and Communication Technology (ICT) Standards and Guidelines*, 82 FR 5790, 5798-99 (Jan. 18, 2017).

<sup>[72]</sup> See W3C, *Guidance on Applying WCAG 2.0 to Non-Web Information and Communications Technologies (WCAG2/ICT)* (Sep. 5, 2003), <https://www.w3.org/TR/wcag2ict/> [<https://perma.cc/6HKS-8YZP>]. This guidance may provide assistance in interpreting certain WCAG 2.0 success criteria (also included in WCAG 2.1 Level AA) that do not appear to be directly applicable to non-web information and communications like conventional electronic documents and mobile apps as written, but that can be made applicable with minor revisions. For example, for Success Criterion 1.4.2 (audio control), replacing the words "on a web page" with "in a non-web document or software" can make this Success Criterion clearly applicable to conventional electronic documents and mobile apps.

allows for equivalent facilitation in § 35.203, meaning that public entities could still choose to comply with additional standards or guidance related to PDFs or digital textbooks to the extent that the standard or technique used provides substantially equivalent or greater accessibility and usability.

In summary, the Department believes that adopting WCAG 2.1 Level AA as the technical standard strikes the appropriate balance of ensuring access for individuals with disabilities and feasibility of implementation because there is a baseline of familiarity with the standard. In addition, for the reasons discussed previously in this appendix, the Department believes that WCAG 2.1 Level AA is an effective standard that sets forth clear, testable success criteria that will provide important benefits to individuals with disabilities.

## WCAG Conformance Level

For web content and mobile apps to conform to WCAG 2.1, they must satisfy the success criteria under one of three levels of conformance: A, AA, or AAA. As previously mentioned, the Department is adopting Level AA as the conformance level under subpart H of this part. In the regulatory text at § 35.200(b)(1) and (2), the Department provides that public entities must comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1. As noted in the NPRM,<sup>[76]</sup> WCAG 2.1 provides that for Level AA conformance, the web page must satisfy all the Level A and Level AA Success Criteria.<sup>[77]</sup> However, individual success criteria in WCAG 2.1 are labeled only as Level A or Level AA. Therefore, a person reviewing individual requirements in WCAG 2.1 may not understand that both Level A and Level AA success criteria must be met to attain Level AA conformance. Accordingly, the Department has made explicit in subpart H that both Level A and Level AA success criteria and conformance requirements must be met in order to comply with subpart H's requirements.

By way of background, the three levels of conformance indicate a measure of accessibility and feasibility. Level A, which is the minimum level of accessibility, contains criteria that provide basic web accessibility and are the least difficult to achieve for web developers.<sup>[78]</sup> Level AA, which is the intermediate level of accessibility, includes all of the Level A criteria and also contains other criteria that provide more comprehensive web accessibility, and yet are still achievable for most web developers.<sup>[79]</sup> Level AAA, which is the highest level of conformance, includes all of the Level A and Level AA criteria and also contains additional criteria that can provide a more enriched user experience,

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<sup>[75]</sup> See W3C, *Understanding Techniques for WCAG Success Criteria* (June 20, 2023), <https://www.w3.org/WAI/WCAG21/Understanding/understanding-techniques> [<https://perma.cc/AMT4-XAAL>].

<sup>[76]</sup> W3C, *Introduction to Understanding WCAG* (June 20, 2023), <https://www.w3.org/WAI/WCAG21/Understanding/intro> [<https://perma.cc/XB3Y-QKVU>].

<sup>[77]</sup> W3C, *EPUB Accessibility 1.1* (May 25, 2023), <https://www.w3.org/TR/epub-a11y-11/> [<https://perma.cc/48A5-NC2B>].

<sup>[78]</sup> W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, § 5.2 Conformance Requirements* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#conformance-reqs> [<https://perma.cc/39WD-CHH9>]. WCAG 2.1 also allows a Level AA conforming alternate version to be provided instead. The Department has adopted a slightly different approach to conforming alternate versions, which is discussed in the section-by-section analysis of § 35.202.

<sup>[79]</sup> 88 FR 51961.

but are the most difficult to achieve for web developers.<sup>[80]</sup> W3C does not recommend that Level AAA conformance be required as a general policy for entire websites because it is not possible to satisfy all Level AAA criteria for some content.<sup>[81]</sup>

Based on public feedback and independent research, the Department believes that WCAG 2.1 Level AA is the appropriate conformance level because it includes criteria that provide web and mobile app accessibility to individuals with disabilities—including those with visual, auditory, physical, speech, cognitive, and neurological disabilities—and yet is feasible for public entities' web developers to implement. Commenters who spoke to this issue generally seemed supportive of this approach. As discussed in the NPRM,<sup>[82]</sup> Level AA conformance is widely used, making it more likely that web developers are already familiar with its requirements. Though many of the entities that conform to Level AA do so under WCAG 2.0, not WCAG 2.1, this still suggests a widespread familiarity with most of the Level AA success criteria, given that 38 of the 50 Level A and AA success criteria in WCAG 2.1 are also included in WCAG 2.0.<sup>[83]</sup> The Department believes that Level A conformance alone is not appropriate because it does not include criteria for providing web accessibility that the Department understands are critical, such as a minimum level of color contrast so that items like text boxes or icons are easier to see, which is important for individuals with vision disabilities.

Some commenters suggested that certain Level AAA criteria or other unique accessibility requirements be added to the technical standard in subpart H of this part. However, the Department believes it would be confusing and difficult to implement certain Level AAA or other unique criteria when such criteria are not required under WCAG 2.1 Level AA. Adopting WCAG 2.1 Level AA as a whole provides greater predictability and reliability. Also, while Level AAA conformance provides a richer user experience, it is the most difficult to achieve for many entities. Again, W3C does not recommend that Level AAA conformance be required as a general policy for entire websites because it is not possible to satisfy all Level AAA criteria for some content.<sup>[84]</sup> Adopting a Level AA conformance level makes the requirements of subpart H consistent with a standard that has been accepted internationally.<sup>[85]</sup> The web content of Federal agencies is also required to conform to WCAG 2.0 Level AA under the Section 508 Standards.<sup>[86]</sup>

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<sup>[81]</sup> See W3C, *Understanding Conformance*, *Understanding Requirement 1*, <https://www.w3.org/WAI/WCAG21/Understanding/conformance> [<https://perma.cc/K94N-Z3TF>].

<sup>[80]</sup> *Id.*

<sup>[79]</sup> *Id.*

<sup>[78]</sup> W3C, *Web Content Accessibility Guidelines (WCAG) 2 Level A Conformance* (July 13, 2020), <https://www.w3.org/WAI/WCAG2A-Conformance> [<https://perma.cc/KT74-JNHG>].

<sup>[83]</sup> W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, 0.5 Comparison with WCAG 2.0* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#comparison-with-wcag-2-0> [<https://perma.cc/H76F-6L27>].

<sup>[82]</sup> 88 FR 51961.

<sup>[86]</sup> See *Information and Communication Technology (ICT) Standards and Guidelines*, 82 FR 5790, 5791 (Jan. 18, 2017).

<sup>[85]</sup> See W3C, *Web Accessibility Laws & Policies*, <https://www.w3.org/WAI/policies/> [<https://perma.cc/6SU3-3VR3>] (Dec. 4, 2023).

Therefore, the Department believes that adopting the Level AA conformance level strikes the right balance between accessibility for individuals with disabilities and achievability for public entities.

## Requirements by Entity Size

In addition to setting forth a technical standard with which public entities must comply, § 35.200(b) also establishes dates by which a public entity must comply. The compliance time frames set forth in § 35.200(b) are generally delineated by the total population of the public entity, as defined in § 35.104. Larger public entities—those with populations of 50,000 or more—will have two years before compliance is first required. For the reasons discussed in the section-by-section analysis of § 35.200(b)(2), small public entities—those with total populations under 50,000—and special district governments will have an additional year, totaling three years, before compliance is first required. The 50,000 population threshold was chosen because it corresponds with the definition of “small governmental jurisdictions” as defined in the Regulatory Flexibility Act.<sup>[87]</sup> After the compliance date, ongoing compliance with subpart H of this part is required.

Commenters expressed a wide range of views about how long public entities should be given to bring their web content and mobile apps into compliance with subpart H of this part. Some commenters expressed concern that public entities would need more time to comply, while others expressed concern that a delayed compliance date would prolong the exclusion of individuals with disabilities from public entities' online services, programs, or activities. Suggestions for the appropriate compliance time frame ranged from six months to six years. There were also some commenters who suggested a phased approach where a public entity would need to periodically meet certain compliance milestones over time by prioritizing certain types of content or implementing certain aspects of the technical standard. Refer to the section of the section-by-section analysis entitled “Compliance Time Frame Alternatives” for further discussion of these suggested approaches.

The Department appreciates the various considerations raised by public stakeholders in their comments. After carefully weighing the arguments that the compliance dates should be kept the same, shortened, lengthened, or designed to phase in certain success criteria or focus on certain content, the Department has decided that the compliance dates in subpart H of this part—two years for large public entities and three years for small public entities and special district governments—strike the appropriate balance between the various interests at stake. Shortening the compliance dates would likely result in increased costs and practical difficulties for public entities, especially small public entities. Lengthening the compliance dates would prolong the exclusion of many individuals with disabilities from public entities' web content and mobile apps. The Department believes that the balance struck in the compliance time frame proposed in the NPRM was appropriate, and that there are no overriding reasons to shorten or lengthen these dates given the important and competing considerations involved by stakeholders.

Some commenters said that the Department should not require compliance with technical standards for mobile apps until at least two years after the compliance deadline for web content. These commenters asserted that having different compliance dates for web content and mobile apps would allow entities to learn how to apply accessibility techniques to their web content and then apply that experience to mobile apps. Other commenters argued that the compliance dates for mobile apps should be shortened or kept as proposed.

<sup>[84]</sup> See W3C, *Understanding Conformance, Understanding Requirement 1*, <https://www.w3.org/WAI/WCAG21/Understanding/conformance> [<https://perma.cc/9ZG9-G5N8>].

<sup>[87]</sup> 5 U.S.C. 601(5).

The Department has considered these comments and subpart H of this part implements the same compliance dates for mobile apps and web content, as proposed in the NPRM. Because users can often access the same information from both web content and mobile apps, it is important that both platforms are subject to the standard at the same times to ensure consistency in accessibility and to reduce confusion. The Department believes these compliance dates strike the appropriate balance between reducing burdens for public entities and ensuring accessibility for individuals with disabilities.

Some commenters stated that it would be helpful to clarify whether subpart H of this part establishes a one-time compliance requirement or instead establishes an ongoing compliance obligation for public entities. The Department wishes to clarify that under subpart H, public entities have an ongoing obligation to ensure that their web content and mobile apps comply with subpart H's requirements, which would include content that is newly added or created after the compliance date. The compliance date is the first time that public entities need to be in compliance with subpart H's requirements; it is not the last. Accordingly, after the compliance date, public entities will continue to need to ensure that all web content and mobile apps they provide or make available comply with the technical standard, except to the extent another provision of subpart H permits otherwise. To make this point more clearly, the Department revised § 35.200(b)(1) and (2) to state that a public entity needs to comply with subpart H beginning two or three years after the publication of the final rule. Additionally, some commenters suggested that public entities be required to review their content for accessibility every few years. The Department does not view this as necessary given the ongoing nature of subpart H's requirements. However, public entities might find that conducting such reviews is helpful in ensuring compliance.

Of course, while public entities must begin complying with subpart H of this part on the applicable compliance date, the Department expects that public entities will need to prepare for compliance during the two or three years before the compliance date. In addition, commenters emphasized—and the Department agrees—that public entities still have an obligation to meet all of title II's existing requirements both before and after the date they must initially come into compliance with subpart H. These include the requirements to ensure equal access, ensure effective communication, and make reasonable modifications to avoid discrimination on the basis of disability.<sup>[88]</sup>

The requirements of § 35.200(b) are generally delineated by the size of the total population of the public entity. If a public entity has a population calculated by the United States Census Bureau in the most recent decennial Census, then the United States Census Bureau's population estimate for that entity in the most recent decennial Census is the entity's total population for purposes of this part. If a public entity is an independent school district, then the district's total population for purposes of this part is determined by reference to the district's population estimate as calculated by the United States Census Bureau in the most recent Small Area Income and Poverty Estimates.

The Department recognizes that some public entities, like libraries or public colleges and universities, do not have population data associated with them in the most recent decennial Census conducted by the United States Census Bureau. As noted in the section-by-section analysis of § 35.104, the Department has inserted a clarification that was previously found in the preamble of the NPRM into the regulatory text of the definition of "total population" in this part to make it easier for public entities like these to determine their total population size for purposes of identifying the applicable compliance date. As the definition of "total population" makes clear, if a public entity, other than a special district government or an independent school district, does not have a population calculated by the United States Census Bureau in the most recent decennial Census, but is an instrumentality or a commuter authority of one or more State or local governments that do have such a population estimate, the population of the

[88] Sections 35.130(b)(1)(ii) and (b)(7) and 35.160.

entity is determined by the combined population of any State or local governments of which the public entity is an instrumentality or commuter authority. For example, a county police department that is an instrumentality of a county with a population of 5,000 would be considered a small public entity (*i.e.*, an entity with a total population of less than 50,000) for purposes of this part, while a city police department that is an instrumentality of a city with a population of 200,000 would not be considered a small public entity. Similarly, if a public entity is an instrumentality of an independent school district, the instrumentality's population for purposes of this part is determined by reference to the total population of the independent school district as calculated in the most recent Small Area Income and Poverty Estimates. This part also states that the National Railroad Passenger Corporation's total population for purposes of this part is determined by reference to the population estimate for the United States as calculated by the United States Census Bureau in the most recent decennial Census.

For purposes of this part, the total population of a public entity is not defined by the population that is eligible for or that takes advantage of the specific services of the public entity. For example, an independent school district with a population of 60,000 adults and children, as calculated in the Small Area Income and Poverty Estimates, is not a small public entity regardless of the number of students enrolled or eligible for services. Similarly, individual county schools are also not considered small public entities if they are instrumentalities of a county that has a population over 50,000. Though a specific county school may create and maintain web content or a mobile app, the Department expects that the specific school may benefit from the resources made available or allocated by the county. This also allows the jurisdiction to assess compliance for its services, programs, and activities holistically. As another example, a public State university located in a town of 20,000 within a State with a population of 5 million would be considered a large public entity for the purposes of this part because it is an instrumentality of the State. However, a county community college in the same State where the county has a population of 35,000 would be considered a small public entity for the purposes of this part, because the community college is an instrumentality of the county.

Some commenters provided feedback on this method of calculating a public entity's size for purposes of determining the applicable compliance time frame. Some public educational entities seemed to mistakenly believe that their populations would be calculated based on the size of their student bodies and suggested that it would be difficult for them to calculate their population size under that approach because they have multiple campuses in different locations. As clarified previously in this appendix, population size for educational entities is determined not by the size of those entities' student bodies, but rather by reference to the Census-calculated total population of the jurisdiction of which the educational entity is an instrumentality.

Other commenters suggested that although public entities without a Census-defined population may be instrumentalities of public entities that do have such a population, those entities do not always reliably receive funding from the public entities of which they are instrumentalities. The Department understands that the financial relationships between these entities may vary, but the Department believes that the method of calculating population it has adopted will generally be the clearest and most effective way for public entities to determine the applicable compliance time frame.

Some commenters associated with educational entities suggested that the Department use the Carnegie classification system for purposes of determining when they must first comply with subpart H of this part. The Carnegie classification system takes into account factors that are not relevant to subpart H, such as the nature of the degrees offered (*e.g.*, baccalaureate versus associate's degrees).<sup>[89]</sup> Subpart H treats educational entities the same as other public entities for purposes of determining the applicable compliance time frame, which promotes consistency and reliability.

Other commenters suggested that factors such as number of employees, budget, number and type of services provided, and web presence be used to determine the appropriate compliance time frame. However, the Department believes that using population as determined by the Census Bureau is the clearest, most predictable, and most reliable factor for determining the compliance time frame. At least one commenter highlighted that population size often relates to the audience of people with disabilities that a public entity serves through its web content and mobile apps. In addition, the Regulatory Flexibility Act uses population size to define what types of governmental jurisdictions qualify as "small."<sup>[90]</sup> This concept, therefore, should be familiar to public entities. Additionally, using population allows the Department to account for the unique challenges faced by small public entities, as discussed in the section-by-section analysis of § 35.200(b)(2).

The Department also received comments asserting that the threshold for being considered "small" should be changed and that the Department should create varying compliance dates based on additional gradations of public entity size. The Department believes it is most appropriate to rely on the 50,000 threshold—which is drawn from and consistent with the Regulatory Flexibility Act—to promote consistency and predictability for public entities. Creating additional categories and compliance time frames would likely result in an unnecessary patchwork of obligations that would make it more difficult for public entities to understand their compliance obligations and for individuals with disabilities to understand their rights. The approach in subpart H of this part preserves the balance between public entities' needs to prepare for costs and individuals with disabilities' needs to access online services, programs, and activities. In addition, breaking down the size categories for compliance dates further could lead to an arbitrary selection of the appropriate size cutoff. The Department selected the size cutoff of 50,000 persons in part because the Regulatory Flexibility Act defines "small governmental jurisdictions" as those with a population of less than 50,000.<sup>[91]</sup> Selecting a different size cutoff would require estimating the appropriate size to use, and without further input from the public, it could lead to an arbitrary selection inconsistent with the needs of public entities. Because of this, the Department believes the most prudent approach is to retain the size categories that are consistent with those outlined in the Regulatory Flexibility Act. The Department also believes that retaining two categories of public entities—large and small—strikes the appropriate balance of acknowledging the compliance challenges that small public entities may face while not crafting a system that is unduly complex, unpredictable, or inconsistent across public entities.

## Section 35.200(b)(1): Larger Public Entities

Section 35.200(b)(1) sets forth the web content and mobile app accessibility requirements for public entities with a total population of 50,000 or more. The requirements of § 35.200(b)(1) apply to larger public entities—specifically, to those public entities that do not qualify as "small governmental jurisdictions" as defined in the Regulatory Flexibility Act.<sup>[92]</sup> Section 35.200(b)(1) requires that beginning two years after the publication of the final rule, these

<sup>[89]</sup> See Am. Council on Educ., *Carnegie Classification of Institutions of Higher Education*, <https://carnegieclassifications.acenet.edu/> [<https://perma.cc/Q9JZ-GQN3>]; Am. Council on Educ., *About the Carnegie Classification*, <https://carnegieclassifications.acenet.edu/carnegie-classification/> [<https://perma.cc/B6BH-68WM>].

<sup>[90]</sup> 5 U.S.C. 601(5).

<sup>[91]</sup> See *id.*

public entities must ensure that the web content and mobile apps that they provide or make available<sup>[93]</sup> comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1, unless the entities can demonstrate that compliance would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.<sup>[94]</sup>

As discussed previously in this appendix, the Department received varied feedback from the public regarding an appropriate time frame for requiring public entities to begin complying with subpart H of this part. Individuals with disabilities and disability advocacy organizations tended to prefer a shorter time frame, often arguing that web accessibility has long been required by the ADA and that extending the deadline for compliance rewards entities that have not made efforts to make their websites accessible. Such commenters also emphasized that a longer compliance time frame would prolong the time that individuals with disabilities would not have access to critical services offered by public entities, which would undermine the purpose of the ADA. Commenters noted that delays in compliance may be particularly problematic in contexts such as voting and education, where delays could be particularly impactful given the time-sensitive nature of these programs. Another commenter who supported shorter time frames pointed out that the Department has entered into settlements with public entities requiring that their websites be made accessible in shorter amounts of time, such as a few months.<sup>[95]</sup> The Department notes that while such settlement agreements serve as important datapoints, those agreements are tailored to the specific situation and entity involved and are not broadly applicable like a regulation.

State and local government entities have been particularly concerned—now and in the past—about shorter compliance deadlines, often citing budgets and staffing as major limitations. For example, as noted in the NPRM, when WCAG 2.0 was relatively new, many public entities stated that they lacked qualified personnel to implement that standard. They told the Department that in addition to needing time to implement the changes to their websites, they also needed time to train staff or contract with professionals who are proficient in developing accessible websites. Considering all these factors, as well as the fact that over a decade has passed since the

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<sup>[94]</sup> The undue financial and administrative burdens limitation on a public entity's obligation to comply with the requirements of subpart H of this part is discussed in more detail in the section-by-section analysis of § 35.204.

<sup>[93]</sup> As the regulatory text for § 35.200(a)(1) and (2) and (b)(1) and (2) makes clear, subpart H of this part covers web content and mobile apps that a public entity provides or makes available, whether directly or through contractual, licensing, or other arrangements. This regulatory text is discussed in more detail in this section.

<sup>[92]</sup> *Id.*

<sup>[95]</sup> See, e.g., Settlement Agreement Between the United States of America and the City of Cedar Rapids, Iowa Under the Americans with Disabilities Act (Sept. 1, 2015), [https://www.ada.gov/cedar\\_rapids\\_pca/cedar\\_rapids\\_sa.html](https://www.ada.gov/cedar_rapids_pca/cedar_rapids_sa.html) [<https://perma.cc/Z338-B2BU>]; Settlement Agreement Between the United States of America and the City of Fort Morgan, Colo. Under the Americans with Disabilities Act (Aug. 8, 2013), <https://www.ada.gov/fort-morgan-pca/fort-morgan-pca-sa.htm> [<https://perma.cc/JA3E-QYMS>]; Settlement Agreement Between the United States of America and the Town of Poestenkill, N.Y. Under the Americans with Disabilities Act (July 19, 2013), <https://www.ada.gov/poestenkill-pca/poestenkill-sa.html> [<https://perma.cc/DGD5-NNC6>].

Department started receiving such feedback and there is now more available technology to make web content and mobile apps accessible, the Department believes a two-year compliance time frame for public entities with a total population of 50,000 or more is appropriate.

Public entities and the community of web developers have had more than a decade to familiarize themselves with WCAG 2.0, which was published in 2008 and serves as the foundation for WCAG 2.1, and more than five years to familiarize themselves with the additional 12 Level A and AA success criteria of WCAG 2.1.<sup>[96]</sup> The Department believes these 12 additional success criteria will not significantly increase the time or resources that it will take for a public entity to come into compliance with subpart H of this part beyond what would have already been required to conform to WCAG 2.0. The Department therefore believes that subpart H's approach balances the resource challenges reported by public entities with the interests of individuals with disabilities in accessing the multitude of services, programs, and activities that public entities now offer via the web and mobile apps.

## Section 35.200(b)(2): Small Public Entities and Special District Governments

Section 35.200(b)(2) sets forth the web content and mobile app accessibility requirements for public entities with a total population of less than 50,000 and special district governments. As noted in the preceding section, the 50,000 population threshold was chosen because it corresponds with the definition of "small governmental jurisdictions" in the Regulatory Flexibility Act.<sup>[97]</sup> Section 35.200(b)(2) requires that beginning three years after the publication of the final rule, these public entities with a total population of less than 50,000 and special district governments must ensure that the web content and mobile apps that they provide or make available<sup>[98]</sup> comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1, unless the entities can demonstrate that compliance would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

### Small Public Entities

The Department appreciates that small public entities may sometimes face unique challenges in making their web content and mobile apps accessible, given that small entities may have more limited or inflexible budgets than other entities. The Department is very sensitive to the need to craft a workable approach for small entities and has taken the needs of small public entities into account at every stage in the rulemaking process, consistent with the Regulatory Flexibility Act of 1980 and Executive Order 13272.<sup>[99]</sup> The NPRM asked a series of questions about the

<sup>[96]</sup> W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, 0.5 Comparison with WCAG 2.0* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#comparison-with-wcag-2-0> [<https://perma.cc/H76F-6L27>].

<sup>[98]</sup> As the regulatory text for § 35.200(a)(1) and (2) and (b)(1) and (2) makes clear, subpart H of this part covers web content and mobile apps that a public entity provides or makes available, whether directly or through contractual, licensing, or other arrangements. This regulatory text is discussed in more detail in this section.

<sup>[97]</sup> 5 U.S.C. 601(5).

impact of the rulemaking on small public entities, including about the compliance costs and challenges that small entities might face in conforming with the rulemaking, the current level of accessibility of small public entities' web content and mobile apps, and whether it would be appropriate to adopt different technical standards or compliance time frames for small public entities.<sup>[100]</sup>

The Department has reviewed public comments, including a comment from the Small Business Administration Office of Advocacy,<sup>[101]</sup> attended a virtual roundtable session hosted by the Small Business Administration at which approximately 200 members of the public were present, and carefully considered this topic. In light of its review and consideration, the Department believes that the most appropriate means of reducing burdens for small public entities is to give small public entities an extra year to comply with subpart H of this part. Accordingly, under § 35.200(b)(2), small public entities, like all other public entities, need to conform to WCAG 2.1 Level AA, but small public entities have three years, instead of the two years provided to larger public entities, to come into compliance. In addition, small public entities (like all public entities) can rely on the five exceptions set forth in § 35.201, in addition to the other mechanisms that are designed to make it feasible for all public entities to comply with subpart H of this part, as set forth in §§ 35.202, 35.203, 35.204 and 35.205.

Many commenters emphasized the challenges that small public entities may face in making their web content and mobile apps accessible. For example, some commenters reported that small public entities often have restricted, inflexible budgets, and might need to divert funds away from other government services in order to comply with subpart H of this part. Some commenters also asserted that the Department underestimated the costs that might be associated with bringing small public entities' web content and mobile apps into compliance. Some commenters noted that small public entities may lack technical expertise and dedicated personnel to work on accessibility issues. Commenters asserted that some small entities' web-based operations are decentralized, and that these entities would therefore need to train a large number of individuals on accessibility to ensure compliance. Commenters also contended that many small public entities may be dependent on third-party vendors to make their content accessible, and that there may be shortages in the number of web developers available to assist with remediation. Some commenters expressed concern that small entities would simply remove their web content rather than make it accessible. Commenters also expressed concern that public entities would need to devote scarce resources to defending against web accessibility lawsuits that might arise as a result of subpart H, which might further exacerbate these entities' budgetary challenges. The Department notes that public entities would not be required to undertake changes that would result in a fundamental alteration in the nature of a service, program, or activity, or impose undue financial and administrative burdens.

As a result of these concerns, some commenters suggested that the Department should create different or more flexible standards for small entities. For example, some commenters suggested that the Department should require small entities to conform to WCAG 2.0 instead of WCAG 2.1, to match the standards that are applicable to the Federal Government under section 508. One commenter suggested that the Department should require small public

<sup>[100]</sup> 88 FR 51961-51966.

<sup>[99]</sup> See *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 FR 43460, 43467 (July 26, 2010); 88 FR 51949, 51961-51966.

<sup>[101]</sup> A discussion of the comment from the Small Business Administration Office of Advocacy can also be found in the Final Regulatory Flexibility Analysis.

entities to comply only with WCAG 2.0 Level A, not Level AA. Other commenters advocating for small public entities suggested that those entities should have more time than larger public entities to comply with subpart H of this part, with suggested compliance time frames ranging from three to six years. Some commenters suggested the Department should adopt extended compliance dates for certain requirements of subpart H that may be more onerous. Commenters noted that having additional time to comply would help public entities allocate financial and personnel resources to bring their websites into compliance. A commenter stated that additional compliance time would also allow more web developers to become familiar with accessibility issues and more digital accessibility consultants to emerge, thereby lowering the cost of testing and consulting services. A commenter noted that some rural public entities may need extra time to bring their content into compliance but asserted that the Department should avoid adopting a compliance date so distant that it does not provide sufficient urgency to motivate those entities to address the issue.

Although many commenters expressed concerns about the impact of subpart H of this part on small public entities, many other commenters expressed opposition to creating different standards or compliance time frames for small entities. Commenters emphasized that people in rural areas might need to travel long distances to access in-person services and that such areas may lack public transportation or rideshare services. Given those considerations, commenters suggested that people with disabilities in small jurisdictions need access to web-based local government services just as much as, and sometimes more than, their counterparts in larger jurisdictions. Some commenters noted that people with disabilities may disproportionately reside in small towns or rural areas, and that it is therefore especially critical for those small and rural governments to have accessible web content and mobile apps. One commenter indicated that rural residents are 14.7 percent more likely than their urban counterparts to have a disability.<sup>[102]</sup> Commenters emphasized the problems that may be associated with imposing different technical standards based on the size of the entity, including a lack of predictability with respect to which government services people can expect to be accessible. Commenters also noted that people with disabilities have a right to equal access to their government's services, regardless of where they live, and stated that setting different standards for small public entities would undermine that right. One commenter stated that, although each small public entity may have only a small population, there are a large number of small public entities, meaning that any lowering of the standards for small public entities would cumulatively affect a large number of people. Some commenters argued that setting different substantive standards for small public entities could make it challenging to enforce subpart H. Some commenters argued that setting different technical standards for small public entities would be inconsistent with title II of the ADA, which does not set different standards based on the size of the entity. One commenter argued that requiring small public entities to comply only with Level A success criteria would be inadequate and inconsistent with international standards.

Commenters also noted that there are many factors that may make it easier for small public entities to comply. For example, some commenters suggested that small entities may have smaller or less complex websites than larger entities. Commenters noted that public entities may be able to make use of free, publicly available resources for checking accessibility and to save money by incorporating accessibility early in the process of content creation, instead of as an afterthought. Commenters also noted that public entities can avoid taking actions that are unduly burdensome by claiming the fundamental alteration or undue burdens limitations where appropriate.

<sup>[102]</sup> See Katrina Crankshaw, U.S. Census Bureau, *Disability Rates Higher in Rural Areas than Urban Areas* (June 26, 2023), [https://www.census.gov/library/stories/2023/06/disability-rates-higher-in-rural-areas-than-urban-areas.html#:~:text=Examining%20disability%20rates%20across%20geography,ACS\)%201%2Dyear%20estimates](https://www.census.gov/library/stories/2023/06/disability-rates-higher-in-rural-areas-than-urban-areas.html#:~:text=Examining%20disability%20rates%20across%20geography,ACS)%201%2Dyear%20estimates) [<https://perma.cc/NP5Y-CUJS>].

One commenter argued that, because there are a limited number of third-party vendors that provide web content for public entities, a few major third-party vendors shifting towards accessibility as a result of increased demand stemming from subpart H of this part could have a cascading effect. This could make the content of many entities that use those vendors or their templates accessible by default. Commenters also noted that setting different technical standards for small public entities would create confusion for those attempting to implement needed accessibility changes. One commenter also contended that it may benefit small public entities to use a more recent version of WCAG because doing so may provide a better experience for all members of the public.

Some commenters pointed out that the challenges small public entities may face are not necessarily unique, and that many public entities, regardless of size, face budgetary constraints, staffing issues, and a need for training. In addition, some commenters noted that the size of a public entity may not always be a good proxy for the number of people who may need access to an entity's website.

Having carefully considered these comments, the Department believes that subpart H of this part strikes the appropriate balance by requiring small public entities to comply with the same technical standard as larger public entities while giving small public entities additional time to do so. The Department believes this longer compliance time frame is prudent in recognition of the additional challenges that small public entities may face in complying, such as limited budgets, lack of technical expertise, and lack of personnel. The Department believes that providing an extra year for small public entities to comply will give those entities sufficient time to properly allocate their personnel and financial resources to make their web content and mobile apps conform to WCAG 2.1 Level AA, without providing so much additional time that individuals with disabilities have a reduced level of access to their State and local government entities' resources for an extended period.

The Department believes that having provided an additional year for small public entities to comply with subpart H of this part, it is appropriate to require those entities to comply with the same technical standard and conformance level as all other public entities. This approach ensures consistent levels of accessibility for public entities of all sizes in the long term, which will promote predictability and reduce confusion about which standard applies. It will allow for individuals with disabilities to know what they can expect when navigating a public entity's web content; for example, it will be helpful for individuals with disabilities to know that they can expect to be able to navigate any public entity's web content independently using their assistive technology. It also helps to ensure that individuals with disabilities who reside in rural areas have comparable access to their counterparts in urban areas, which is critical given the transportation and other barriers that people in rural areas may face.<sup>[103]</sup> In addition, for the reasons discussed elsewhere in this appendix, the Department believes that WCAG 2.1 Level AA contains success criteria that are critical to accessing services, programs, or activities of public entities, which may not be included under a lower standard. The Department notes that under appropriate circumstances, small public entities may also rely on the exceptions, flexibilities, and other mechanisms described in the section-by-section analysis of §§ 35.201, 35.202, 35.203, 35.204, and 35.205, which the Department believes should help make compliance feasible for those entities.

Some commenters suggested that the Department should provide additional exceptions or flexibilities to small public entities. For example, the Small Business Administration suggested that the Department explore developing a wholesale exception to subpart H of this part for certain small public entities. The Department does not believe

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<sup>[103]</sup> See, e.g., NORC Walsh Ctr. for Rural Health Analysis & Rural Health Info. Hub, *Access to Care for Rural People with Disabilities Toolkit* (Dec. 2016), <https://www.ruralhealthinfo.org/toolkits/disabilities.pdf> [<https://perma.cc/YX4E-QWEE>].

that setting forth a wholesale exception for small public entities would be appropriate for the same reasons that it would not be appropriate to adopt a different technical standard for those entities. Such an exception would mean that an individual with a disability who lives in a small, rural area, might not have the same level of access to their local government's web-based services, programs, and activities as an individual with a disability in a larger, urban area. This would significantly undermine consistency and predictability in web accessibility. It would also be particularly problematic given the interconnected nature of many different websites. Furthermore, an exception for small public entities would reduce the benefits of subpart H of this part for those entities. The Department has heard from public entities seeking clarity about how to comply with their nondiscrimination obligations under title II of the ADA when offering services via the web. Promulgating an exception for small public entities from the technical standard described in subpart H would not only hinder access for individuals with disabilities but would also leave those entities with no clear standard for how to satisfy their existing obligations under the ADA and the title II regulation.

Other commenters made alternative suggestions, such as making WCAG 2.1 Level AA compliance recommended but not required. The Department does not believe this suggestion is workable or appropriate. As discussed in the section entitled, "Inadequacy of Voluntary Compliance with Technical Standards," and as the last few decades have shown, the absence of a mandatory technical standard for web content and mobile apps has not resulted in widespread equal access for people with disabilities. For subpart H of this part to have a meaningful effect, the Department believes it must set forth specific requirements so that both individuals with disabilities and public entities have clarity and predictability in terms of what the law requires. The Department believes that creating a recommended, non-mandatory technical standard would not provide this clarity or predictability and would instead largely maintain the status quo.

Some commenters suggested that the Department should allow small public entities to avoid making their web content and mobile apps accessible by instead offering services to individuals with disabilities via the phone, providing an accessibility disclaimer or statement, or offering services to individuals with disabilities through other alternative methods that are not web-based. As discussed in the section entitled "History of the Department's Title II Web-Related Interpretation and Guidance" and in the NPRM,<sup>[104]</sup> given the way the modern web has developed, the Department no longer believes 24/7 staffed telephone lines can realistically provide equal opportunity to individuals with disabilities in the way that web content and content in mobile apps can. If a public entity provides services, programs, or activities to the public via the web or mobile apps, it generally needs to ensure that those services, programs, or activities are accessible. The Department also does not believe that requirement is met by a public entity merely providing an accessibility disclaimer or statement explaining how members of the public can request accessible web content or mobile apps. If none of a public entity's web content or mobile apps were to conform to the technical standard adopted in subpart H of this part, individuals with disabilities would need to request access each and every time they attempted to interact with the public entity's services, programs, or activities, which would not provide equal opportunity. Similarly, it would not provide equal opportunity to offer services, programs, or activities via the web or mobile apps to individuals without disabilities but require individuals with disabilities to rely exclusively on other methods to access those services.

Many commenters also asked the Department to provide additional resources and guidance to help small entities comply. The Small Business Administration Office of Advocacy also highlighted the need for the Department to produce a small entity compliance guide.<sup>[105]</sup> The Department plans to issue the required small entity compliance guide. The Department is also issuing a Final Regulatory Flexibility Analysis as part of this rulemaking, which

<sup>[104]</sup> 88 FR 51953.

explains the impact of subpart H of this part on small public entities. In addition, although the Department does not currently operate a grant program to assist public entities in complying with the ADA, the Department will consider offering additional technical assistance and guidance in the future to help entities better understand their obligations. The Department also operates a toll-free ADA Information Line at (800) 514-0301 (voice) or 1-833-610-1264 (TTY), which public entities can call to get technical assistance about the ADA, including information about subpart H.

Many commenters also expressed concern about the potential for an increase in litigation for small public entities as a result of subpart H of this part. Some commenters asked the Department to create a safe harbor or other flexibilities to protect small public entities from frivolous litigation. In part to address these concerns, subpart H includes a new section, at § 35.205, which states that a public entity that is not in full compliance with the requirements of § 35.200(b) will be deemed to have met the requirements of § 35.200 in the limited circumstance in which the public entity can demonstrate that the noncompliance has such a minimal impact on access that it would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app in a substantially equivalent manner as individuals without disabilities. As discussed at more length in the section-by-section analysis of § 35.205, the Department believes this provision will reduce the risk of litigation for public entities while ensuring that individuals with disabilities have substantially equivalent access to public entities' services, programs, and activities. Section 35.205 will allow public entities to avoid falling into noncompliance with § 35.200 if they are not exactly in conformance to WCAG 2.1 Level AA, but the nonconformance would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app with substantially equivalent timeliness, privacy, independence, and ease of use. The Department believes that this will afford more flexibility for all public entities, including small ones, while simultaneously ensuring access for individuals with disabilities.

One commenter asked the Department to state that public entities, including small ones, that are working towards conformance to WCAG 2.1 Level AA before the compliance dates are in compliance with the ADA and not engaging in unlawful discrimination. The Department notes that while the requirement to comply with the technical standard set forth in subpart H of this part is new, the underlying obligation to ensure that all services, programs, and activities, including those provided via the web and mobile apps, are accessible is not.<sup>[106]</sup> Title II currently requires public entities to, for example, provide equal opportunity to participate in or benefit from services, programs, or activities;<sup>[107]</sup> make reasonable modifications to policies, practices, or procedures;<sup>[108]</sup> and ensure that communications with people with disabilities are as effective as communications with others, which includes considerations of timeliness, privacy, and independence.<sup>[109]</sup> Accordingly, although public entities do not need to comply with subpart H until two or three years after the publication of the final rule, they will continue to have to take steps to ensure accessibility in the meantime, and will generally have to achieve compliance with the technical standard by the date specified in subpart H.

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[105] See Contract with America Advancement Act of 1996, Public Law 104-121, sec. 212, 110 Stat. 847, 858 (5 U.S.C. 601 note).

[106] Section 35.160.

[107] Section 35.130(b)(7)(i).

[108] Sections 35.130(b)(1)(ii) and 35.160(b)(1).

[109] See, e.g., §§ 35.130 and 35.160.

Some commenters asked the Department to provide additional flexibility for small public entities with respect to captioning requirements. A discussion of the approach to captioning in subpart H of this part can be found in the section entitled "Captions for Live-Audio and Prerecorded Content." Some commenters also expressed that it would be helpful for small entities if the Department could provide additional guidance on how the undue burdens limitation operates in practice. Additional information on this issue can be found in the section-by-section analysis of § 35.204, entitled "Duties." Some commenters asked the Department to add a notice-and-cure provision to subpart H to help protect small entities from liability. For the reasons discussed in the section-by-section analysis of § 35.205, entitled "Effect of noncompliance that has a minimal impact on access," the Department does not believe this approach is appropriate.

## Special District Governments

In addition to small public entities, § 35.200(b)(2) also covers public entities that are special district governments. As previously noted, special district governments are governments that are authorized to provide a single function or a limited number of functions, such as a zoning or transit authority. As discussed elsewhere in this appendix, § 35.200 proposes different compliance dates according to the size of the Census-defined population of the public entity, or, for public entities without Census-defined populations, the Census-defined population of any State or local governments of which the public entity is an instrumentality or commuter authority. The Department believes applying to special district governments the same compliance date as small public entities (*i.e.*, compliance in three years) is appropriate for two reasons. First, because the Census Bureau does not provide population estimates for special district governments, these limited-purpose public entities might find it difficult to obtain population estimates that are objective and reliable in order to determine their duties under subpart H of this part. Though some special district governments may estimate their total populations, these entities may use varying methodology to calculate population estimations, which may lead to confusion and inconsistency in the application of the compliance dates in § 35.200. Second, although special district governments may sometimes serve a large population, unlike counties, cities, or townships with large populations that provide a wide range of online government services and programs and often have large and varying budgets, special district governments are authorized to provide a single function or a limited number of functions (*e.g.*, to provide mosquito abatement or water and sewer services). They therefore may have more limited or specialized budgets. Therefore, § 35.200(b)(2) extends the deadline for compliance for special district governments to three years, as it does for small public entities.

The Department notes that some commenters opposed giving special district governments three years to comply with subpart H of this part. One commenter asserted that most special district governments are aware of the size of the regions they serve and would be able to determine whether they fall within the threshold for small entities. One commenter noted that some special district governments may serve larger populations and should therefore be treated like large public entities. Another commenter argued that a public entity that has sufficient administrative and fiscal autonomy to qualify as a separate government should have the means to comply with subpart H in a timely manner. However, as noted in the preceding paragraph, the Department is concerned that, because these special district governments do not have a population calculated by the Census Bureau and may not be instrumentalities of a public entity that does have a Census-calculated population, it is not clear that there is a straightforward way for these governments to calculate their precise population. The Department also understands that these governments have limited functions and may have particularly limited or constrained budgets in some cases. The Department therefore continues to believe it is appropriate to give these governments three years to comply.

## Compliance Time Frame Alternatives

In addition to asking that the compliance time frames be lengthened or shortened, commenters also suggested a variety of other alternatives and models regarding how § 35.200's compliance time frames could be structured. Commenters proposed that existing content be treated differently than new content by, for example, requiring that new content be made accessible first and setting delayed or deferred compliance time frames for existing content. Other commenters suggested that the Department use a "runway" or "phase in" model. Under this model, commenters suggested, the Department could require conformance to some WCAG success criteria sooner than others. Commenters also suggested a phase-in model where public entities would be required to prioritize certain types of content, such as making all frequently used content conform to WCAG 2.1 Level AA first.

Because § 35.200 gives public entities two or three years to come into compliance depending on entity size, public entities have the flexibility to structure their compliance efforts in the manner that works best for them. This means that if public entities want to prioritize certain success criteria or content during the two or three years before the compliance date—while still complying with their existing obligations under title II—they have the flexibility to do so. The Department believes that this flexibility appropriately acknowledges that different public entities might have unique needs based on the type of content they provide, users that they serve, and resources that they have or procure. The Department, therefore, is not specifying certain criteria or types of content that should be prioritized. Public entities have the flexibility to determine how to make sure they comply with § 35.200 in the two- or three-year period before which compliance with § 35.200 is first required. After the compliance date, ongoing compliance is required.

In addition, the Department believes that requiring only new content to be accessible or using another method for prioritization could lead to a significant accessibility gap for individuals with disabilities if public entities rely on content that is not regularly updated or changed. The Department notes that unless otherwise covered by an exception, subpart H of this part requires that new and existing content be made accessible within the meaning of § 35.200 after the date initial compliance is required. Because some exceptions in § 35.201 only apply to preexisting content, the Department believes it is likely that public entities' own newly created or added content will largely need to comply with § 35.200 because such content may not qualify for exceptions. For more information about how the exceptions under § 35.201 function and how they will likely apply to existing and new content, please review the analysis of § 35.201 in this section-by-section analysis.

Commenters also suggested that public entities be required to create transition plans like those discussed in the existing title II regulation at §§ 35.105 and 35.150(d). The Department does not believe it is appropriate to require transition plans as part of subpart H of this part for several reasons. Public entities are already required to ensure that their services, programs, and activities, including those provided via the web or mobile apps, meet the requirements of the ADA. The Department expects that many entities already engage in accessibility planning and self-evaluation to ensure compliance with title II. By not being prescriptive about the type of planning required, the Department will allow public entities flexibility to build on existing systems and processes or develop new ones in ways that work for each entity. Moreover, the Department has not adopted new self-evaluation and transition plan requirements in other sections in this part in which it adopted additional technical requirements, such as in the 2010 ADA Standards for Accessible Design.<sup>[110]</sup> Finally, the Department believes that public entities' resources may be better spent making their web content and mobile apps accessible under § 35.200, instead of drafting required self-evaluation and transition plans. The Department notes that public entities can still engage in self-evaluation and create transition plans, and would likely find it helpful, but they are not required to do so under § 35.200.

## Fundamental Alteration or Undue Financial and Administrative Burdens

As discussed at greater length in the section-by-section analysis of § 35.204, subpart H of this part provides that where a public entity can demonstrate that compliance with the requirements of § 35.200 would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, compliance with § 35.200 is only required to the extent that it does not result in a fundamental alteration or undue financial and administrative burdens. For example, where it would impose undue financial and administrative burdens to conform to WCAG 2.1 Level AA (or part of WCAG 2.1 Level AA), public entities would not be required to remove their web content and mobile apps, forfeit their web presence, or otherwise undertake changes that would be unduly financially and administratively burdensome. These limitations on a public entity's duty to comply with the regulatory provisions in subpart H of this part mirror the fundamental alteration or undue burdens limitations currently provided in the title II regulation in §§ 35.150(a)(3) (existing facilities) and 35.164 (effective communication) and the fundamental alteration limitation currently provided in the title II regulation in § 35.130(b)(7) (reasonable modifications in policies, practices, or procedures).

If a public entity believes that a proposed action would fundamentally alter a service, program, or activity or would result in undue financial and administrative burdens, the public entity has the burden of proving that compliance would result in such an alteration or such burdens. The decision that compliance would result in such an alteration or such burdens must be made by the head of the public entity or their designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. As set forth in § 35.200(b)(1) and (2), if an action required to comply with the accessibility standard in subpart H of this part would result in such an alteration or such burdens, a public entity must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity. Section 35.204, entitled "Duties," lays out the circumstances in which an alteration or such burdens can be claimed. For more information, see the discussion regarding limitations on obligations in the section-by-section analysis of § 35.204.

## Requirements for Selected Types of Content

In the NPRM, the Department asked questions about the standards that should apply to two particular types of content: social media platforms and captions for live-audio content.<sup>[110]</sup> In this section, the Department includes information about the standards that subpart H of this part applies to these types of content and responds to the comments received on these topics.

### Public Entities' Use of Social Media Platforms

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[110] Section 35.151.

[111] 88 FR 51958, 51962-51963, 51965-51966.

Public entities are increasingly using social media platforms to provide information and communicate with the public about their services, programs, or activities in lieu of or in addition to engaging the public on the public entities' own websites. Consistent with the NPRM, the Department is using the term "social media platforms" to refer to websites or mobile apps of third parties whose primary purpose is to enable users to create and share content in order to participate in social networking (i.e., the creation and maintenance of personal and business relationships online through websites and mobile apps like Facebook, Instagram, X (formerly Twitter), and LinkedIn).

Subpart H of this part requires that web content and mobile apps that public entities provide or make available, directly or through contractual, licensing, or other arrangements, be made accessible within the meaning of § 35.200. This requirement applies regardless of whether that content is located on the public entity's own website or mobile app or elsewhere on the web or in mobile apps. The requirement therefore covers web content or content in a mobile app that a public entity makes available via a social media platform. With respect to social media posts that are posted before the compliance date, however, the Department has decided to add an exception, which is explained more in the section-by-section analysis of § 35.201(e), "Preexisting Social Media Posts".

Many social media platforms that are widely used by members of the public are available to members of the public separate and apart from any arrangements with public entities to provide a service, program, or activity. As a result, subpart H of this part does not require public entities to ensure that such platforms themselves conform to WCAG 2.1 Level AA. However, because the posts that public entities disseminate through those platforms are provided or made available by the public entities, the posts generally must conform to WCAG 2.1 Level AA. The Department understands that social media platforms often make available certain accessibility features like the ability to add captions or alt text. It is the public entity's responsibility to use these features when it makes web content available on social media platforms.<sup>[112]</sup> For example, if a public entity posts an image to a social media platform that allows users to include alt text, the public entity needs to ensure that appropriate alt text accompanies that image so that screen-reader users can access the information.

The Department received many comments explaining the importance of social media to accessing public entities' services, programs, or activities. Both public entities and disability advocates shared many examples of public entities using social media to transmit time-sensitive and emergency information, among other information, to the public. The vast majority of these commenters supported covering social media posts in subpart H of this part. Commenters specifically pointed to examples of communications designed to help the public understand what actions to take during and after public emergencies, and commenters noted that these types of communications need to be accessible to individuals with disabilities. Commenters from public entities and trade groups representing public accommodations opposed the coverage of social media posts in subpart H, arguing that social media is more like advertising. These commenters also said it is difficult to make social media content accessible because the platforms sometimes do not enable accessibility features.

The Department agrees with the many commenters who opined that social media posts should be covered by subpart H of this part. The Department believes public entities should not be relieved from their duty under subpart H to provide accessible content to the public simply because that content is being provided through a social media platform. The Department was particularly persuaded by the many examples that commenters shared of

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<sup>[112]</sup> See U.S. Gen. Servs. Admin., *Federal Social Media Accessibility Toolkit Hackpad*, <https://digital.gov/resources/federal-social-media-accessibility-toolkit-hackpad/> [<https://perma.cc/DJ8X-UCHA>] (last visited Mar. 13, 2024).

emergency and time-sensitive communications that public entities share through social media platforms, including emergency information about toxic spills and wildfire smoke, for example. The Department believes that this information must also be accessible to individuals with disabilities. The fact that public entities use social media platforms to disseminate this type of crucial information also belies any analogy to advertising. And even to the extent that information does not rise to the level of an emergency, if an entity believes information is worth posting on social media for members of the public without disabilities, it is no less important for that information to reach members of the public with disabilities. Therefore, the entity cannot deny individuals with disabilities equal access to that content, even if it is not about an emergency.

The Department received several comments explaining that social media platforms sometimes have limited accessibility features, which can be out of public entities' control. Some of these commenters suggested that the Department should prohibit or otherwise limit a public entity's use of inaccessible social media platforms when the public entity cannot ensure accessibility of the platform. Other commenters shared that even where there are accessibility features available, public entities frequently do not use them. The most common example of this issue was public entities failing to use alt text, and some commenters also shared that public entities frequently use inaccessible links. Several commenters also suggested that the Department should provide that where the same information is available on a public entity's own accessible website, public entities should be considered in compliance with this part even if their content on social media platforms cannot be made entirely accessible.

The Department declines to modify subpart H of this part in response to these commenters, because the Department believes the framework in subpart H balances the appropriate considerations to ensure equal access to public entities' postings to social media. Public entities must use available accessibility features on social media platforms to ensure that their social media posts comply with subpart H. However, where public entities do not provide social media platforms as part of their services, programs, or activities, they do not need to ensure the accessibility of the platform as a whole. Finally, the Department is declining to adopt the alternative suggested by some commenters that where the same information is available on a public entity's own accessible website, the public entity should be considered in compliance with subpart H. The Department heard concerns from many commenters about allowing alternative accessible versions when the original content itself can be made accessible. Disability advocates and individuals with disabilities shared that this approach has historically resulted in inconsistent and dated information on the accessible version and that this approach also creates unnecessary segregation between the content available for individuals with disabilities and the original content. The Department agrees with these concerns and therefore declines to adopt this approach. Social media posts enable effective outreach from public entities to the public, and in some cases social media posts may reach many more people than a public entity's own website. The Department sees no acceptable reason why individuals with disabilities should be excluded from this outreach.

The Department received a few other comments related to social media, suggesting for example that the Department adopt guidance on making social media accessible instead of covering social media in subpart H of this part, and suggesting that the Department require inclusion of a disclaimer with contact information on social media platforms so that the public can notify a public entity about inaccessible content. The Department believes that these proposals would be difficult to implement in a way that would ensure content is proactively made accessible, rather than reactively corrected after it is discovered to be inaccessible, and thus the Department declines to adopt these proposals.

## Captions for Live-Audio and Prerecorded Content

WCAG 2.1 Level AA Success Criterion 1.2.4 requires captions for live-audio content in synchronized media.<sup>[113]</sup> The intent of this success criterion is to “enable people who are deaf or hard of hearing to watch *real-time* presentations. Captions provide the part of the content available via the audio track. Captions not only include dialogue, but also identify who is speaking and notate sound effects and other significant audio.”<sup>[114]</sup> Modern live captioning often can be created with the assistance of technology, such as by assigning captioners through Zoom or other conferencing software, which integrates captioning with live meetings.

As proposed in the NPRM,<sup>[115]</sup> subpart H of this part applies the same compliance dates (determined primarily by size of public entity) to all of the WCAG 2.1 Level AA success criteria, including live-audio captioning requirements. As stated in § 35.200(b), this provides three years after publication of the final rule for small public entities and special district governments to comply, and two years for large public entities. Subpart H takes this approach for several reasons. First, the Department understands that live-audio captioning technology has developed in recent years and continues to develop. In addition, the COVID-19 pandemic moved a significant number of formerly in-person meetings, activities, and other gatherings to online settings, many of which incorporated live-audio captioning. As a result of these developments, live-audio captioning has become even more critical for individuals with certain types of disabilities to participate fully in civic life. Further, the Department believes that requiring conformance to all success criteria by the same date (according to entity size) will address the need for both clarity for public entities and predictability for individuals with disabilities. As with any other success criterion, public entities would not be required to satisfy Success Criterion 1.2.4 if they can demonstrate that doing so would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

The Department solicited comments to inform this approach, seeking input on the proposed compliance timeline, the type of live-audio content that entities make available through the web or mobile apps, and the cost of providing captioning for live-audio content for entities of all sizes.<sup>[116]</sup> Commenters expressed strong support for requiring captions as a general matter, noting that they benefit people with a variety of disabilities, including those who are deaf, deafblind, or neurodivergent, or have auditory processing disabilities. No commenters argued for an outright exception to the captioning requirement. The vast majority of commenters who responded to these questions, including disability advocates, public entities, and accessible technology industry members, agreed with the Department’s proposal to require compliance with requirements for captioning live-audio content on the same timeline as all other WCAG 2.1 Level AA success criteria. Such commenters noted that a different compliance timeline for live-audio captioning would unfairly burden people who are deaf or have hearing loss and would limit their access to a wide swath of content. One commenter who had worked in higher education, for instance, noted challenges of providing live-audio captioning, including the limited number of captioners available and resulting need for lead time to reserve one, but nonetheless stated that entities should strive for the same compliance date.

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<sup>[114]</sup> *Id.* (emphasis in original).

<sup>[113]</sup> W3C, *Understanding WCAG 2.0: Captions (Live), Understanding SC 1.2.4* (2023), <http://www.w3.org/TR/UNDERSTANDING-WCAG20/media-equiv-real-time-captions.html> [<https://perma.cc/NV74-U77R>].

<sup>[115]</sup> 88 FR 51965-51966.

<sup>[116]</sup> 88 FR 51965-51966.

A smaller number of commenters urged the Department to adopt a longer compliance time frame in order to allow live-captioning technology to develop further. Some of these commenters supported a longer time frame for smaller entities in particular, which may have fewer resources or budgetary flexibility to comply. Others supported a longer time frame for larger entities because they are likely to have more content to caption. Commenters also noted the difficulty that public entities sometimes encounter in the availability of quality professional live captioners and the lead time necessary to reserve those services, but at the same time noted that public entities do not necessarily want to rely on automatically generated captioning in all scenarios because it may be insufficient for an individual's needs.

Commenters shared that public entities make many types of live-audio content available, including town hall meetings, board meetings, and other public engagement meetings; emergency-related and public-service announcements or information; special events like graduations, conferences, or symposia; online courses; and press conferences. Commenters also posed questions about whether Success Criterion 1.2.4 would apply to particular situations and types of media. The Department suggests referring to the explanation and definitions of the terms in Success Criterion 1.2.4 in WCAG 2.1 to determine the live-audio web content and content in mobile apps that must have captions.

Success Criterion 1.2.4 is crucial for individuals with disabilities to access State and local government entities' live services, programs, or activities. The Department believes that setting a different compliance date would only delay this essential access and leave people who are deaf or have hearing disabilities at a particular disadvantage in accessing these critical services. It also would hinder access for people with a variety of other disabilities, including cognitive disabilities.<sup>[117]</sup>

The Department believes that the compliance dates set forth in subpart H of this part will give public entities sufficient time to locate captioning resources and implement or enhance processes to ensure they can get captioning services when needed. Captioning services are also likely to continue to expand. Given the quick acceleration in the availability of captioning technology during the COVID-19 pandemic, the Department believes that public entities' capacity as well as the technology and personnel on which they rely will be able to continue to develop quickly.

The Department declines to establish a different compliance time frame for Success Criterion 1.2.4 for other reasons as well. This success criterion in WCAG 2.1 was also part of WCAG 2.0, which was finalized in 2008. As a result, the Department expects that public entities and associated web developers will be able to become familiar with it quickly, if they are not already familiar. Additionally, setting a separate compliance date for one success criterion could result in confusion and additional difficulty, as covered entities would need to separately keep track of when they need to meet the live-audio captioning success criterion and bifurcate their compliance planning. The Department also does not see a sufficient reason to distinguish this success criterion from others as meriting a separate timeline, particularly when this criterion has existed since 2008 and is so essential for individuals who are deaf or have hearing disabilities. For these reasons, and because of the need for individuals with disabilities to access State and local government entities' live programs, services, and activities, subpart H of this part establishes a uniform compliance date for all success criteria in subpart H.

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<sup>[117]</sup> See W3C, Web Accessibility Initiative, *Video Captions*, <https://www.w3.org/WAI/perspective-videos/captions/> [<https://perma.cc/QW6X-5SPG>] (Jan. 23, 2019) (explaining that captions benefit "people with cognitive and learning disabilities who need to see and hear the content to better understand it").

Commenters also expressed a range of opinions about whether using automatically generated captions instead of professional live-captioning services would be sufficient to comply with Success Criterion 1.2.4. These commenters noted that automatic captions are a widely available option that is low cost for public entities and will likely continue to improve, perhaps eventually surpassing the quality of professional live-captioning services. However, commenters also pointed out that automatic captions may not be sufficient in many contexts such as virtual classrooms or courtrooms, where mistakes in identifying a speaker, word, or punctuation can significantly change the meaning and the participant with a disability needs to be able to respond in real time. Commenters also argued, though, that requiring human captioners in all circumstances may lead to public entities making fewer meetings, hearings, courses, and other live-audio content available online due to cost and availability of captioners, which could have a detrimental effect on overall access to these services for people with mobility and other disabilities. Public entities noted that automatic captioning as part of services like Zoom does not cost them anything beyond the Zoom license, but public entities and the Small Business Administration reported that costs can be much higher for human-generated captions for different types of content over the course of a year.

To balance these competing concerns, commenters supported requiring captions in general, but proposed a variety of tiered approaches such as: a default of human-generated captions with automatic captions as a last resort; automatic captions as a default with human-generated captions when an individual with a disability requests them; or human-generated captions as a default for events with a wide audience like graduations, but automatic captions as a default for private meetings and courses, unless human-generated captions are requested. An accessible technology industry member urged the Department to just require captions that provide "equivalent access" to live-audio content, rather than mandate a particular type of captioning.

After consideration of commenters' concerns and its independent assessment, the Department does not believe it is prudent to prescribe captioning requirements beyond the WCAG 2.1 Level AA requirements, whether by specifying a numerical accuracy standard, a method of captioning that public entities must use to satisfy this success criterion, or other measures. The Department recognizes commenters' concerns that automatic captions are currently not sufficiently accurate in many contexts, including contexts involving technical or complex issues. The Department also notes that informal guidance from W3C provides that automatic captions are not sufficient on their own unless they are confirmed to be fully accurate, and that they generally require editing to reach the requisite level of accuracy.<sup>[118]</sup> On the other hand, the Department recognizes the significant costs and supply challenges that can accompany use of professional live-captioning services, and the pragmatic concern that a requirement to use these services for all events all the time could discourage public entities from conducting services, programs, or activities online, which could have unintended detrimental consequences for people with and without disabilities who benefit from online offerings. Further, it is the Department's understanding, supported by comments, that captioning technology is rapidly evolving and any additional specifications regarding how to meet WCAG 2.1's live-audio captioning requirements could quickly become outdated.

Rather than specify a particular accuracy level or method of satisfying Success Criterion 1.2.4 at this time, subpart H of this part provides public entities with the flexibility to determine the best way to comply with this success criterion based on current technology. The Department further encourages public entities to make use of W3C's and others' guidance documents available on captioning, including the informal guidance mentioned in the preceding paragraph.<sup>[119]</sup> In response to commenters' concerns that captioning requirements could lead to fewer online events, the Department reminds public entities that, under § 35.204, they are not required to take any action that

<sup>[118]</sup> W3C, Web Accessibility Initiative, *Captions/Subtitles*, <https://www.w3.org/WAI/media/av/captions> [<https://perma.cc/D73P-RBZA>] (July 14, 2022).

would result in a fundamental alteration to their services, programs, or activities or undue financial and administrative burdens; but even in those circumstances, public entities must comply with § 35.200 to the maximum extent possible. The Department believes the approach in subpart H strikes the appropriate balance of increasing access for individuals with disabilities, keeping pace with evolving technology, and providing a workable standard for public entities.

Some commenters expressed similar concerns related to captioning requirements for prerecorded (*i.e.*, non-live) content under Success Criterion 1.2.2, including concerns that public entities may choose to remove recordings of past events such as public hearings and local government sessions rather than comply with captioning requirements in the required time frames. The Department recommends that public entities consider other options that may alleviate costs, such as evaluating whether any exceptions apply, depending on the particular circumstances. And as with live-audio captioning, public entities can rely on the fundamental alteration or undue burdens provisions in § 35.204 where they can satisfy the requirements of those provisions. Even where a public entity can demonstrate that conformance to Success Criterion 1.2.2 would result in a fundamental alteration or undue financial and administrative burdens, the Department believes public entities may often be able to take other actions that do not result in such an alteration or such burdens; if they can, § 35.204 requires them to do so.

The same reasoning discussed regarding Success Criterion 1.2.4 also applies to Success Criterion 1.2.2. The Department declines to adopt a separate timeline for this success criterion or to prescribe captioning requirements beyond those in WCAG 2.1 due to rapidly evolving technology, the importance of these success criteria, and the other factors already noted. After full consideration of all the comments received, subpart H of this part requires conformance to WCAG 2.1 Level AA as a whole on the same compliance time frame, for all of the reasons stated in this section.

## Section 35.201 Exceptions

Section 35.200 requires public entities to make their web content and mobile apps accessible by complying with a technical standard for accessibility—WCAG 2.1 Level AA. However, some types of content do not have to comply with the technical standard in certain situations. The Department's aim in setting forth exceptions was to make sure that individuals with disabilities have ready access to public entities' web content and mobile apps, especially those that are current, commonly used, or otherwise widely needed, while also ensuring that practical compliance with subpart H of this part is feasible and sustainable for public entities. The exceptions help to ensure that compliance with subpart H is feasible by enabling public entities to focus their resources on making frequently used or high impact content WCAG 2.1 Level AA compliant first.

Under § 35.201, the following types of content generally do not need to comply with the technical standard for accessibility—WCAG 2.1 Level AA: (1) archived web content; (2) preexisting conventional electronic documents, unless they are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities; (3) content posted by a third party; (4) individualized, password-protected or otherwise secured

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[119] E.g., W3C, Web Accessibility Initiative, *Captions/Subtitles*, <https://www.w3.org/WAI/media/av/captions> [<https://perma.cc/D73P-RBZA>] (July 14, 2022); W3C, WCAG 2.2 Understanding Docs: *Understanding SC 1.2.4: Captions (Live) (Level AA)*, <https://www.w3.org/WAI/WCAG22/Understanding/captions-live.html> [<https://perma.cc/R8SZ-JA6Z>] (Mar. 7, 2024).

conventional electronic documents; and (5) preexisting social media posts. The Department notes that if web content or content in mobile apps is covered by one exception, the content does not need to conform to WCAG 2.1 Level AA to comply with subpart H of this part, even if the content fails to qualify for another exception.

However, as discussed in more detail later in this section-by-section analysis, there may be situations in which the content otherwise covered by an exception must still be made accessible to meet the needs of an individual with a disability under existing title II requirements.<sup>[120]</sup> Because these exceptions are specifically tailored to address what the Department understands to be existing areas where compliance might be particularly difficult based on current content types and technologies, the Department also expects that these exceptions may become less relevant over time as new content is added and technology changes.

The previously listed exceptions are those included in § 35.201. They differ in some respects from those exceptions proposed in the NPRM. The Department made changes to the proposed exceptions identified in the NPRM after consideration of the public comments and its own independent assessment. Notably, § 35.201 does not include exceptions for password-protected course content in elementary, secondary, and postsecondary schools, which had been proposed in the NPRM.<sup>[121]</sup> As will be discussed in more detail, it also does not include an exception for linked third-party content because that proposed exception would have been redundant and could have caused confusion. In the NPRM, the Department discussed the possibility of including an exception for public entities' preexisting social media posts.<sup>[122]</sup> After consideration of public feedback, § 35.201 includes such an exception. In addition, the Department made some technical tweaks and clarifications to the exceptions.<sup>[123]</sup>

The Department heard a range of views from public commenters on the exceptions proposed in the NPRM. The Department heard from some commenters that exceptions are necessary to avoid substantial burdens on public entities and would help public entities determine how to allocate their limited resources in terms of which content to make accessible more quickly, especially when initially determining how best to ensure they can start complying with § 35.200 by the compliance date. The Department heard that public entities often have large volumes of content that are archived, or documents or social media posts that existed before subpart H of this part was promulgated. The Department also heard that although making this content available online is important for transparency and ease of access, this content is typically not frequently used and is likely to be of interest only to a discrete population. Such commenters also emphasized that making such content, like old PDFs, accessible by the compliance date would be quite difficult and time consuming. Some commenters also expressed that the exceptions may help public entities avoid uncertainty about whether they need to ensure accessibility in situations where it might be extremely difficult—such as for large quantities of archived materials retained only for research purposes or where they have little control over content posted to their website by unaffiliated third parties. Another commenter noted that public entities may have individualized documents that apply only to individual members of the public and that in most cases do not need to be accessed by a person with a disability.

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[120] See §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

[123] *Id.* at 52019-52020.

[122] *Id.* at 51962-51963.

[121] 88 FR 52019.

On the other hand, the Department has also heard from commenters who objected to the inclusion of exceptions. Many commenters who objected to the inclusion of exceptions cited the need for all of public entities' web content and mobile apps to be accessible to better ensure predictability and access for individuals with disabilities to critical government services. Some commenters who opposed including exceptions also asserted that a title II regulation need not include any exceptions to its specific requirements because the compliance limitation for undue financial and administrative burdens would suffice to protect public entities from any overly burdensome requirements. Some commenters argued that the exceptions would create loopholes that would result in public entities not providing sufficient access for individuals with disabilities, which could undermine the purpose of subpart H of this part.

Commenters also contended that the proposed exceptions create confusion about what is covered and needs to conform to WCAG 2.1, which creates difficulties with compliance for public entities and barriers for individuals with disabilities seeking to access public entities' web content or mobile apps. Some commenters also noted that there are already tools that can help public entities make web content and mobile apps accessible, such that setting forth exceptions for certain content is not necessary to help public entities comply.

After consideration of the various public comments and after its independent assessment, the Department is including, with some refinements, five exceptions in § 35.201. As noted in the preceding paragraphs and as will be discussed in greater detail, the Department is not including in the final regulations three of the exceptions that were proposed in the NPRM, but the Department is also adding an exception for preexisting social media posts that it previewed in the NPRM. The five particular exceptions included in § 35.201 were crafted with careful consideration of which discrete types of content would promote as much clarity and certainty as possible for individuals with disabilities as well as for public entities when determining which content must conform to WCAG 2.1 Level AA, while also still promoting accessibility of web content and mobile apps overall. The limitations for actions that would require fundamental alterations or result in undue burdens would not provide, on their own, the same level of clarity and certainty. The rationales with respect to each individual exception are discussed in more detail in the section-by-section analysis of each exception. The Department believes that including these five exceptions, and clarifying situations in which content covered by an exception might still need to be made accessible, strikes the appropriate balance between ensuring access for individuals with disabilities and feasibility for public entities so that they can comply with § 35.200, which will ensure greater accessibility moving forward.

The Department was mindful of the pragmatic concern that, should subpart H of this part require actions that are likely to result in fundamental alterations or undue burdens for large numbers of public entities or large swaths of their content, subpart H could in practice lead to fewer impactful improvements for accessibility across the board as public entities encountered these limitations. The Department believes that such a rule could result in public entities' prioritizing accessibility of content that is "easy" to make accessible, rather than content that is essential, despite the spirit and letter of the rule. The Department agrees with commenters that clarifying that public entities do not need to focus resources on certain content helps ensure that public entities can focus their resources on the large volume of content not covered by exceptions, as that content is likely more frequently used or up to date. In the sections that follow, the Department provides explanations for why the Department has included each specific exception and how the exceptions might apply.

The Department understands and appreciates that including exceptions for certain types of content reduces the content that would be accessible at the outset to individuals with disabilities. The Department aimed to craft the exceptions with an eye towards providing exceptions for content that would be less commonly used by members of the public and would be particularly difficult for public entities to make accessible quickly. And the Department reiterates that subpart H of this part is adding specificity into the existing title II regulatory framework when it comes to web content and mobile apps. The Department emphasizes that, even if certain content does not have to

conform to the technical standard, public entities still need to ensure that their services, programs, and activities offered using web content and mobile apps are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under title II of the ADA. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the entity's services, programs, and activities.<sup>[124]</sup> For example, a public entity might need to provide a large print version or a version of an archived document that implements some WCAG criteria—such as a document explaining park shelter options and rental prices from 2013—to a person with vision loss who requests it, even though this content would fall within the archived web content exception. Thus, § 35.201's exceptions for certain categories of content are layering specificity onto title II's regulatory requirements. They do not function as permanent or blanket exceptions to the ADA's nondiscrimination mandate. They also do not add burdens on individuals with disabilities that did not already exist as part of the existing title II regulatory framework. As explained further, nothing in this part prohibits an entity from going beyond § 35.200's requirements to make content covered by the exceptions fully or partially compliant with WCAG 2.1 Level AA.

The following discussion provides information on each of the exceptions, including a discussion of public comments.

## Archived Web Content

Public entities may retain a significant amount of archived content, which may contain information that is outdated, superfluous, or replicated elsewhere. The Department's understanding is that, generally, this historic information is of interest to only a small segment of the general population. The Department is aware and concerned, however, that based on current technologies, public entities would need to expend considerable resources to retroactively make accessible the large quantity of historic or otherwise outdated information that public entities created in the past and that they may need or want to make available on their websites. Thus, § 35.201(a) provides an exception from the requirements of § 35.200 for web content that meets the definition of "archived web content" in § 35.104.<sup>[125]</sup> As mentioned previously, the definition of "archived web content" in § 35.104 has four parts. First, the web content was created before the date the public entity is required to comply with subpart H of this part, reproduces paper documents created before the date the public entity is required to comply with subpart H, or reproduces the contents of other physical media created before the date the public entity is required to comply with subpart H. Second, the web content is retained exclusively for reference, research, or recordkeeping. Third, the web content is not altered or updated after the date of archiving. Fourth, the web content is organized and stored in a dedicated area or areas clearly identified as being archived. The archived web content exception allows public entities to retain historic web content, while utilizing their resources to make accessible the most widely and consistently used content that people need to access public services or to participate in civic life.

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<sup>[124]</sup> See §§ 35.130(b)(1)(ii) and (b)(7) and 35.160. For more information about public entities' existing obligation to ensure that communications with individuals with disabilities are as effective as communications with others, see U.S. Dep't of Just., *ADA Requirements: Effective Communication*, ada.gov (Feb 28, 2020), <https://www.ada.gov/resources/effective-communication/> [<https://perma.cc/CLT7-5PNQ>].

The Department anticipates that public entities may retain various types of web content consistent with the exception for archived web content. For example, a town might create a web page for its annual parade. In addition to providing current information about the time and place of the parade, the web page might contain a separate archived section with several photos or videos from the parade in past years. The images and videos would likely be covered by the exception if they were created before the date the public entity is required to comply with subpart H of this part, are reproductions of paper documents created before the date the public entity is required to comply with subpart H, or are reproductions of the contents of other physical media created before the date the public entity is required to comply with subpart H; they are only used for reference, research, or recordkeeping; they are not altered or updated after they are posted in the archived section of the web page; and the archived section of the web page is clearly identified. Similarly, a municipal court may have a web page that includes links to download PDF documents that contain a photo and short biography of past judges who are retired. If the PDF documents were created before the date the public entity is required to comply with subpart H, are reproductions of paper documents created before the date the public entity is required to comply with subpart H, or are reproductions of the contents of other physical media created before the date the public entity is required to comply with subpart H; they are only used for reference, research, or recordkeeping; they are not altered or updated after they are posted; and the web page with the links to download the documents is clearly identified as being an archive, the documents would likely be covered by the exception. The Department reiterates that these examples are meant to be illustrative and that the analysis of whether a given piece of web content meets the definition of "archived web content" depends on the specific circumstances.

The Department recognizes, and commenters emphasized, that archived information may be of interest to some members of the public, including some individuals with disabilities, who are conducting research or are otherwise interested in these historic documents. Furthermore, some commenters expressed concerns that public entities would begin (or already are in some circumstances) improperly moving content into an archive. The Department emphasizes that under this exception, public entities may not circumvent their accessibility obligations by merely labeling their web content as "archived" or by refusing to make accessible any content that is old. The exception focuses narrowly on content that satisfies all four of the criteria necessary to qualify as "archived web content," namely web content that was created before the date the public entity is required to comply with subpart H of this part, reproduces paper documents created before the date the public entity is required to comply with subpart H, or reproduces the contents of other physical media created before the date the public entity is required to comply with subpart H; is retained exclusively for reference, research, or recordkeeping; is not altered or updated after the date of archiving; and is organized and stored in a dedicated area or areas clearly identified as being archived. If any one of those criteria is not met, the content does not qualify as "archived web content." For example, if an entity maintains content for any purpose other than reference, research, or recordkeeping, then that content would not fall within the exception regardless of the date it was created, even if an entity labeled it as "archived" or stored it in an area clearly identified as being archived. Similarly, an entity would not be able to circumvent its accessibility obligations by moving web content containing meeting minutes or agendas related to meetings that take place after the date the public entity is required to comply with subpart H from a non-archived section of its website to an archived section, because such newly created content would likely not satisfy the first part of the definition based on the date it was created. Instead, such newly created documents would generally need to conform to WCAG 2.1 Level AA for their initial intended purpose related to the meetings, and they would need to remain accessible if they were later added to an area clearly identified as being archived.

[125] In the NPRM, § 35.201(a) referred to archived web content as defined in § 35.104 "of this chapter." 88 FR 52019. The Department has removed the language "of this chapter" because it was unnecessary.

The Department received comments both supporting and opposing the exception. In support of the exception, commenters highlighted various benefits. For example, commenters noted that remediating archived web content can be very burdensome, and the exception allows public entities to retain content they might otherwise remove if they had to make the content conform to WCAG 2.1 Level AA. Some commenters also agreed that public entities should prioritize making current and future web content accessible.

In opposition to the exception, commenters highlighted various concerns. For example, some commenters stated that the exception perpetuates unequal access to information for individuals with disabilities, and it continues to inappropriately place the burden on individuals with disabilities to identify themselves to public entities, request access to content covered by the exception, and wait for the request to be processed. Some commenters also noted that the exception is not necessary because the compliance limitations for fundamental alteration and undue financial and administrative burdens would protect public entities from any unrealistic requirements under subpart H of this part.<sup>[126]</sup> Commenters also stated that the proposed exception is not timebound; it does not account for technology that exists, or might develop in the future, that may allow for easy and reliable wide-scale remediation of archived web content; it might deter development of technology that could reliably remediate archived web content; and it does not include a time frame for the Department to reassess whether the exception is necessary based on technological developments.<sup>[127]</sup> In addition, commenters stated that the exception covers HTML content, which is easier to make accessible than other types of web content; and it might cover archived web content posted by public entities in accordance with other laws. As previously discussed with respect to the definition of "archived web content," some commenters also stated that it is not clear when web content is retained exclusively for reference, research, or recordkeeping, and public entities may therefore improperly designate important web content as archived.

The Department has decided to keep the exception in § 35.201. After reviewing the range of different views expressed by commenters, the Department continues to believe that the exception appropriately encourages public entities to utilize their resources to make accessible the critical up-to-date materials that are most consistently used to access public entities' services, programs, or activities. The Department believes the exception provides a measure of clarity and certainty for public entities about what is required of archived web content. Therefore, resources that might otherwise be spent making accessible large quantities of historic or otherwise outdated information available on some public entities' websites are freed up to focus on important current and future web content that is widely and frequently used by members of the public. However, the Department emphasizes that the exception is not without bounds. As discussed in the preceding paragraphs, archived web content must meet all four parts of the archived web content definition in order to qualify for the exception. Content must meet the time-based criteria specified in the first part of the definition. The Department believes the addition of the first part of the definition will lead to greater predictability about the application of the exception for individuals with disabilities and public entities. In addition, web content that is used for something other than reference, research, or recordkeeping is not covered by the exception.

The Department understands the concerns raised by commenters about the burdens that individuals with disabilities may face because archived web content is not required to conform to WCAG 2.1 Level AA. The Department emphasizes that even if certain content does not have to conform to the technical standard, public

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<sup>[127]</sup> The section-by-section analysis of § 35.200 includes a discussion of the Department's obligation to do a periodic retrospective review of its regulations pursuant to Executive Order 13563.

<sup>[126]</sup> A discussion of the relationship between these limitations and the exceptions in § 35.201 is also provided in the general explanation at the beginning of the discussion of § 35.201 in the section-by-section analysis.

entities still need to ensure that their services, programs, and activities offered using web content are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under title II. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the entity's services, programs, or activities.<sup>[128]</sup> Some commenters suggested that the Department should also specify that if a public entity makes archived web content conform to WCAG 2.1 Level AA in response to a request from an individual with a disability, such as by remediating a PDF stored in an archived area on the public entity's website, the public entity should replace the inaccessible version in the archive with the updated accessible version that was sent to the individual. The Department agrees that this is a best practice public entities could implement, but did not add this to the text of this part because of the importance of providing public entities flexibility to meet the needs of individuals with disabilities on a case-by-case basis.

Some commenters suggested that the Department should require public entities to adopt procedures and timelines for how individuals with disabilities could request access to inaccessible archived web content covered by the exception. The Department declines to make specific changes to the exception in response to these comments. The Department reiterates that, even if content is covered by this exception, public entities still need to ensure that their services, programs, and activities offered using web content are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under title II.<sup>[129]</sup> The Department notes that it is helpful to provide individuals with disabilities with information about how to obtain the reasonable modifications or auxiliary aids and services they may need. Public entities can help to facilitate effective communication by providing notice to the public on how an individual who cannot access archived web content covered by the exception because of a disability can request other means of effective communication or reasonable modifications in order to access the public entity's services, programs, or activities with respect to the archived content. Public entities can also help to facilitate effective communication by providing an accessibility statement that tells the public how to bring web content or mobile app accessibility problems to the public entities' attention, and developing and implementing a procedure for reviewing and addressing any such issues raised. For example, a public entity could help to facilitate effective communication by providing an email address, accessible link, accessible web page, or other accessible means of contacting the public entity to provide information about issues that individuals with disabilities may encounter accessing web content or mobile apps or to request assistance. Providing this information will help public entities to ensure that they are satisfying their obligations to provide equal access, effective communication, and reasonable modifications.

Some commenters suggested that this part should require a way for users to search through archived web content, or information about the contents of the archive should otherwise be provided, so individuals with disabilities can identify what content is contained in an archive. Some other commenters noted that searching through an archive is inherently imprecise and involves sifting through many documents, but the exception places the burden on individuals with disabilities to know exactly which archived documents to request in accessible formats. After carefully considering these comments, the Department decided not to change the text of this part. The Department emphasizes that web content that is not archived, but instead notifies users about the existence of archived web content and provides users access to archived web content, generally must still conform to WCAG 2.1 Level AA. Therefore, the Department anticipates that members of the public will have information about what content is

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<sup>[128]</sup> See §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

<sup>[129]</sup> *Id.*

contained in an archive. For example, a public entity's archive may include a list of links to download archived documents. Under WCAG 2.1 Success Criterion 2.4.4, a public entity would generally have to provide sufficient information in the text of the link alone, or in the text of the link together with the link's programmatically determined link context, so users could understand the purpose of each link and determine whether they want to access a given document in the archive.<sup>[130]</sup>

Some commenters suggested that public entities should ensure that the systems they use to retain and store archived web content do not convert the content into an inaccessible format. The Department does not believe it is necessary to make updates to this part in response to these comments. Content that does not meet the definition of "archived web content" must generally conform to WCAG 2.1 Level AA, unless it qualifies for another exception, so public entities would not be in compliance with subpart H of this part if they stored such content using a system that converts accessible web content into an inaccessible format. The Department anticipates that public entities will still move certain newly created web content into an archive alongside historic content after the date they are required to comply with subpart H, even though the newly created content will generally not meet the definition of "archived web content." For example, after the time a city is required to comply with subpart H, the city might post a PDF flyer on its website identifying changes to the dates its sanitation department will pick up recycling around a holiday. After the date of the holiday passes, the city might move the flyer to an archive along with other similar historic flyers. Because the newly created flyer would not meet the first part of the definition of "archived web content," it would generally need to conform to WCAG 2.1 Level AA even after it is moved into an archive. Therefore, the city would need to ensure its system for retaining and storing archived web content does not convert the flyer into an inaccessible format.

Some commenters also suggested that the exception should not apply to public entities whose primary function is to provide or make available what commenters perceived as archived web content, such as some libraries, museums, scientific research organizations, or state or local government agencies that provide birth or death records. Commenters expressed concern that the exception could be interpreted to cover the entirety of such entities' web content. The Department reiterates that whether archived web content is retained exclusively for reference, research, or recordkeeping depends on the particular circumstances. For example, a city's research library may have both archived and non-archived web content related to a city park. If the library's collection included a current map of the park that was created by the city, that map would likely not be retained exclusively for reference, research, or recordkeeping, as it is a current part of the city's program of providing and maintaining a park. Furthermore, if the map was newly created after the date the public entity was required to comply with subpart H of this part, and it does not reproduce paper documents or the contents of other physical media created before the date the public entity was required to comply with subpart H, the map would likely not meet the first part of the definition of "archived web content." In addition, the library may decide to curate and host an exhibition on its website about the history of the park, which refers to and analyzes historic web content pertaining to the park that otherwise meets the definition of "archived web content." All content used to deliver the online exhibition likely would not be used exclusively for reference, research, or recordkeeping, as the library is using the materials to create and provide a new educational program for the members of the public. The Department believes the exception, including the definition of "archived web content," provides a workable framework for determining whether all types of public entities properly designate web content as archived.

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<sup>[130]</sup> See W3C, *Understanding SC 2.4.4.: Link Purpose (In Context)* (June 20, 2023), <https://www.w3.org/WAI/WCAG21/Understanding/link-purpose-in-context.html> [<https://perma.cc/RE3T-J9PN>].

In the NPRM, the Department asked commenters about the relationship between the content covered by the archived web content exception and the exception for preexisting conventional electronic documents set forth in § 35.201(b).<sup>[131]</sup> In response, some commenters sought clarification about the connection between the exceptions or recommended that there should only be one exception. The Department believes both exceptions are warranted because they play different roles in freeing up public entities' personnel and financial resources to make accessible the most significant content that they provide or make available. As discussed in the preceding paragraphs, the archived web content exception provides a framework for public entities to prioritize their resources on making accessible the up-to-date materials that people use most widely and consistently, rather than historic or outdated web content. However, public entities cannot disregard such content entirely. Instead, historic or outdated web content that entities intend to treat as archived web content must be located and added to an area or areas clearly designated as being archived. The Department recognizes that creating an archive area or areas and moving content into the archive will take time and resources. As discussed in the section-by-section analysis of § 35.201(b), the preexisting conventional electronic documents exception provides an important measure of clarity and certainty for public entities as they initially consider how to address all the various conventional electronic documents available through their web content and mobile apps. Public entities will not have to immediately focus their time and resources on remediating or archiving less significant preexisting documents that are covered by the exception. Instead, public entities can focus their time and resources elsewhere and attend to preexisting documents covered by the preexisting conventional electronic documents exception in the future as their resources permit, such as by adding them to an archive.

The Department recognizes that there may be some overlap between the content covered by the archived web content exception and the exception for preexisting conventional electronic documents set forth in § 35.201(b). The Department notes that if web content is covered by the archived web content exception, it does not need to conform to WCAG 2.1 Level AA to comply with subpart H of this part, even if the content fails to qualify for another exception, such as the preexisting conventional electronic document exception. For example, after the date a public university is required to comply with subpart H, its athletics website may still include PDF documents containing the schedules for sports teams from academic year 2017-2018 that were posted in non-archived areas of the website in the summer of 2017. Those PDFs may be covered by the preexisting conventional electronic documents exception because they were available on the university's athletics website prior to the date it was required to comply with subpart H, unless they are currently used to apply for, gain access to, or participate in a public entity's services, programs, or activities, in which case, as discussed in more detail in the section-by-section analysis of § 35.201(b), they would generally need to conform to WCAG 2.1 Level AA. However, if the university moved the PDFs to an archived area of its athletics site and the PDFs satisfied all parts of the definition of "archived web content," the documents would not need to conform to WCAG 2.1 Level AA, regardless of how the preexisting conventional electronic document exception might otherwise have applied, because the content would fall within the archived web content exception.

Some commenters also made suggestions about public entities' practices and procedures related to archived web content, but these suggestions fall outside the scope of this part. For example, some commenters stated that public entities' websites should not contain archived materials, or that all individuals should have to submit request forms to access archived materials. The Department did not make any changes to this part in response to these comments because this part is not intended to control whether public entities can choose to retain archived material in the first instance, or whether members of the public must follow certain steps to access archived web content.

[131] 88 FR 51968.

## Preexisting Conventional Electronic Documents

Section 35.201(b) provides that conventional electronic documents that are available as part of a public entity's web content or mobile apps before the date the public entity is required to comply with subpart H of this part do not have to comply with the accessibility requirements of § 35.200, unless such documents are currently used to apply for, gain access to, or participate in a public entity's services, programs, or activities. As discussed in the section-by-section analysis of § 35.104, the term "conventional electronic documents" is defined in § 35.104 to mean web content or content in mobile apps that is in the following electronic file formats: portable document formats, word processor file formats, presentation file formats, and spreadsheet file formats. This list of conventional electronic documents is an exhaustive list of file formats, rather than an open-ended list. The Department understands that many websites of public entities contain a significant number of conventional electronic documents that may contain text, images, charts, graphs, and maps, such as comprehensive reports on water quality. The Department also understands that many of these conventional electronic documents are in PDF format, but many conventional electronic documents may also be formatted as word processor files (e.g., Microsoft Word files), presentation files (e.g., Apple Keynote or Microsoft PowerPoint files), and spreadsheet files (e.g., Microsoft Excel files).

Because of the substantial number of conventional electronic documents that public entities make available through their web content and mobile apps, and because of the personnel and financial resources that would be required for public entities to remediate all preexisting conventional electronic documents to make them accessible after the fact, the Department believes public entities should generally focus their personnel and financial resources on developing new conventional electronic documents that are accessible and remediating existing conventional electronic documents that are currently used to access the public entity's services, programs, or activities. For example, if before the date a public entity is required to comply with subpart H of this part the entity's website contains a series of out-of-date PDF reports on local COVID-19 statistics, those reports generally need not conform to WCAG 2.1 Level AA. Similarly, if a public entity maintains decades' worth of water quality reports in conventional electronic documents on the same web page as its current water quality report, the old reports that were posted before the date the entity was required to comply with subpart H generally do not need to conform to WCAG 2.1 Level AA. As the public entity posts new reports going forward, however, those reports generally must conform to WCAG 2.1 Level AA.

The Department modified the language of this exception from the NPRM. In the NPRM, the Department specified that the exception applied to conventional electronic documents "created by or for a public entity" that are available "on a public entity's website or mobile app." The Department believes the language "created by or for a public entity" is no longer necessary in the regulatory text of the exception itself because the Department updated the language of § 35.200 to clarify the overall scope of content generally covered by subpart H of this part. In particular, the text of § 35.200(a)(1) and (2) now states that subpart H applies to all web content and mobile apps that a public entity provides or makes available either directly or through contractual, licensing, or other arrangements. Section 35.201(b), which is an exception to the requirements of § 35.200, is therefore limited by the new language added to the general section. In addition, the Department changed the language "that are available on a public entity's website or mobile app" to "that are available as part of a public entity's web content or mobile apps" to ensure consistency with other parts of the regulatory text by referring to "web content" rather than "websites." Finally, the Department removed the phrase "members of the public" from the language of the exception in the proposed rule for consistency with the edits to § 35.200 aligning the scope of subpart H with the scope of title II of the ADA, as described in the explanation of § 35.200 in the section-by-section analysis.

Some commenters sought clarification about how to determine whether a conventional electronic document is “preexisting.” They pointed out that the date a public entity posted or last modified a document may not necessarily reflect the actual date the document was first made available to members of the public. For example, a commenter noted that a public entity may copy its existing documents unchanged into a new content management system after the date the public entity is required to comply with subpart H of this part, in which case the date stamp of the documents will reflect the date they were copied rather than the date they were first made available to the public. Another commenter recommended that the exception should refer to the date a document was “originally” posted to account for circumstances in which there is an interruption to the time the document is provided or made available to members of the public, such as when a document is temporarily not available due to technical glitches or server problems.

The Department believes the exception is sufficiently clear. Conventional electronic documents are preexisting if a public entity provides them or makes them available prior to the date the public entity is required to comply with subpart H of this part. While one commenter recommended that the exception should not apply to documents provided or made available during the two- or three-year compliance timelines specified in § 35.200(b), the Department believes the timelines specified in that section are the appropriate time frames for assessing whether a document is preexisting and requiring compliance with subpart H. If a public entity changes or revises a preexisting document following the date it is required to comply with subpart H, the document would no longer be “preexisting” for the purposes of the exception. Whether documents would still be preexisting if a public entity generally modifies or updates the entirety of its web content or mobile apps after the date it is required to comply with subpart H would depend on the particular facts and circumstances. For example, if a public entity moved all of its web content, including preexisting conventional electronic documents, to a new content management system, but did not change or revise any of the preexisting documents when doing so, the documents would likely still be covered by the exception. In contrast, if the public entity decided to edit the content of certain preexisting documents in the process of moving them to the new content management system, such as by updating the header of a benefits application form to reflect the public entity's new mailing address, the updated documents would no longer be preexisting for the purposes of the exception. The Department emphasizes that the purpose of the exception is to free up public entities' resources that would otherwise be spent focusing directly on preexisting documents covered by the exception.

Because the exception only applies to preexisting conventional electronic documents, it would not cover documents that are open for editing if they are changed or revised after the date a public entity is required to comply with subpart H of this part. For example, a town may maintain an editable word processing file, such as a Google Docs file, that lists the dates on which the town held town hall meetings. The town may post a link to the document on its website so members of the public can view the document online in a web browser, and it may update the contents of the document over time after additional meetings take place. If the document was posted to the town's website prior to the date it was required to comply with subpart H, it would be a preexisting conventional electronic document unless the town added new dates to the document after the date it was required to comply with subpart H. If the town made such additions to the document, the document would no longer be preexisting. Nevertheless, there are some circumstances where conventional electronic documents may be covered by the exception even if copies of the documents can be edited after the date the public entity is required to comply with subpart H. For example, a public entity may post a Microsoft Word version of a flyer on its website prior to the date it is required to comply with subpart H. A member of the public could technically download and edit that Word document after the date the public entity is required to comply with subpart H, but their edits would not impact the “official” posted version. Therefore, the official version would still qualify as preexisting under the exception. Similarly, PDF files that include fillable form fields (e.g., areas for a user to input their name and address) may also be covered by the exception so long as members of the public do not edit the content contained in the official posted version of the document. However, as discussed in the following paragraph, the exception does not apply to documents that are

currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities. The Department notes that whether a PDF document is fillable may be relevant in considering whether the document is currently used to apply for, gain access to, or participate in a public entity's services, programs, or activities. For example, a PDF form that must be filled out and submitted when renewing a driver's license is currently used to apply for, gain access to, or participate in a public entity's services, programs, or activities, and therefore would not be subject to the exception under § 35.201(b) for preexisting conventional electronic documents. One commenter recommended that the Department clarify in the text of the regulation that conventional electronic documents include only those documents that are not open for editing by the public. The Department believes this point is adequately captured by the requirement that conventional electronic documents must be preexisting to qualify for the exception.

This exception is not without bounds: it does not apply to any preexisting documents that are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities. In referencing "documents that are currently used," the Department intends to cover documents that are used at any given point in the future, not just at the moment in time when the final rule is published. For example, a public entity generally must make a preexisting PDF application for a business license conform to WCAG 2.1 Level AA if the document is still currently used. The Department notes that preexisting documents are also not covered by the exception if they provide instructions or guidance related to other documents that are directly used to apply for, gain access to, or participate in the public entity's services, programs, or activities. Therefore, in addition to making the aforementioned preexisting PDF application for a business license conform to WCAG 2.1 Level AA, public entities generally must also make other preexisting documents conform to WCAG 2.1 Level AA if they may be needed to obtain the license, complete the application, understand the process, or otherwise take part in the program, such as business license application instructions, manuals, sample knowledge tests, and guides, such as "Questions and Answers" documents.

Various commenters sought additional clarification about what it means for conventional electronic documents to be "used" in accordance with the limited scope of the exception. In particular, commenters questioned whether informational documents are used by members of the public to apply for, gain access to, or participate in a public entity's services, programs, or activities. Some commenters expressed concern that the scope of the exception would be interpreted inconsistently, including with respect to documents posted by public entities in accordance with other laws. Some commenters also urged the Department to add additional language to the exception, such as specifying that documents would not be covered by the exception if they are used by members of the public to "enable or assist" them to apply for, gain access to, or participate in a public entity's services, programs, or activities, or the documents "provide information about or describe" a public entity's services, programs, or activities.

Whether a document is currently used to apply for, gain access to, or participate in a public entity's services, programs, or activities is a fact-specific analysis. For example, one commenter questioned whether a document containing a city's description of a public park and its accessibility provisions would be covered by the exception if the document did not otherwise discuss a particular event or program. The Department anticipates that the exception would likely not cover such a document. One of the city's services, programs, or activities is providing and maintaining a public park and its accessibility features. An individual with a disability who accesses the document before visiting the park to understand the park's accessibility features would be currently using the document to gain access to the park.

One commenter suggested that if a public entity cannot change preexisting conventional electronic documents due to legal limitations or other similar restrictions, then the public entity should not have to make those documents accessible under subpart H of this part, even if they are currently used by members of the public to apply for, gain access to, or participate in a public entity's services, programs, or activities. The Department did not make changes

to the exception because subpart H already includes a provision that addresses such circumstances in § 35.202. Namely, public entities are permitted to use conforming alternate versions of web content where it is not possible to make web content directly accessible due to technical or legal limitations. Therefore, a public entity could provide an individual with a disability a conforming alternate version of a preexisting conventional electronic document currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities if the document could not be made accessible for the individual due to legal limitations.

One commenter expressed concern that public entities might convert large volumes of web content to formats covered by the exception ahead of the compliance dates in subpart H of this part. In contrast, a public entity stated that there is limited incentive to rush to post inaccessible documents prior to the compliance dates because documents are frequently updated, and it would be easier for the public entity to create accessible documents in the first place than to try to remediate inaccessible documents in the future. The Department emphasizes that a public entity may not rely on the exception to circumvent its accessibility obligations under subpart H by, for example, converting all of its web content to conventional electronic document formats and posting those documents before the date the entity must comply with subpart H. Even if a public entity did convert various web content to preexisting conventional electronic documents before the date it was required to comply with subpart H, the date the documents were posted is only one part of the analysis under the exception. If any of the converted documents are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities, they would not be covered by the exception and would generally need to conform to WCAG 2.1 Level AA, even if those documents were posted before the date the entity was required to comply with subpart H. And if a public entity revises a conventional electronic document after the date the entity must comply with subpart H, that document would no longer qualify as "preexisting" and would thus need to be made accessible as defined in § 35.200.

The Department received comments both supporting and opposing the exception. In support of the exception, commenters highlighted various benefits. For example, commenters noted that the exception would help public entities preserve resources because remediating preexisting documents is time consuming and expensive. Commenters also noted that the exception would focus public entities' resources on current and future content rather than preexisting documents that may be old, rarely accessed, or of little benefit. Commenters stated that in the absence of this exception public entities might remove preexisting documents from their websites.

In opposition to the exception, commenters highlighted various concerns. For example, commenters argued that the exception is inconsistent with the ADA's goal of equal access for individuals with disabilities because it perpetuates unequal access to information available through public entities' web content and mobile apps, and it is unnecessary because the compliance limitations for fundamental alteration and undue financial and administrative burdens would protect public entities from any unrealistic requirements under subpart H of this part. Commenters also asserted that the exception excludes relevant and important content from becoming accessible, and it inappropriately continues to place the burden on individuals with disabilities to identify themselves to public entities, request access to the content covered by the exception, and wait for the request to be processed. In addition, commenters argued that the exception covers file formats that do not need to be covered by an exception because they can generally be remediated easily; it is not timebound; it does not account for technology that exists, or might develop in the future, that may allow for easy and reliable wide-scale remediation of conventional electronic documents; and it might deter development of technology to reliably remediate conventional electronic documents. Commenters also stated that the exception is confusing because, as described elsewhere in this appendix, it may not be clear when documents are "preexisting" or "used" to apply for, gain access to, or participate in a public entity's services, programs, or activities, and confusion or a lack of predictability would make advocacy efforts more difficult.

After reviewing the comments, the Department has decided to keep the exception in § 35.201. The Department continues to believe that the exception provides an important measure of clarity and certainty for public entities as they initially consider how to address all the various conventional electronic documents provided and made available through their web content and mobile apps. The exception will allow public entities to primarily focus their resources on developing new conventional electronic documents that are accessible as defined under subpart H of this part and remediating preexisting conventional electronic documents that are currently used to apply for, gain access to, or participate in their services, programs, or activities. In contrast, public entities will not have to expend their resources on identifying, cataloguing, and remediating preexisting conventional electronic documents that are not currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities. Based on the exception, public entities may thereby make more efficient use of the resources available to them to ensure equal access to their services, programs, or activities for all individuals with disabilities.

The Department understands the concerns raised by commenters about the potential burdens that individuals with disabilities may face because some conventional electronic documents covered by the exception are not accessible. The Department emphasizes that even if certain content does not have to conform to the technical standard, public entities still need to ensure that their services, programs, and activities offered using web content and mobile apps are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under title II of the ADA. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the entity's services, programs, or activities.<sup>[132]</sup>

Some commenters suggested that the Department should require public entities to adopt procedures and timelines for how individuals with disabilities could request access to inaccessible conventional electronic documents covered by the exception. One commenter also suggested that subpart H of this part should require the ongoing provision of accessible materials to an individual with a disability if a public entity is on notice that the individual needs access to preexisting conventional electronic documents covered by the exception in accessible formats. The Department declines to make specific changes to the exception in response to these comments and reiterates that public entities must determine on a case-by-case basis how best to meet the needs of those individuals who cannot access the content contained in documents that are covered by the exception. It is helpful to provide individuals with disabilities with information about how to obtain the modifications or auxiliary aids and services they may need. Public entities can help to facilitate effective communication by providing notice to the public on how an individual who cannot access preexisting conventional electronic documents covered by the exception because of a disability can request other means of effective communication or reasonable modifications in order to access the public entity's services, programs, or activities with respect to the documents. Public entities can also facilitate effective communication by providing an accessibility statement that tells the public how to bring web content or mobile app accessibility problems to the public entities' attention and developing and implementing a procedure for reviewing and addressing any such issues raised. For example, a public entity could facilitate effective communication by providing an email address, accessible link, accessible web page, or other accessible means of contacting the public entity to provide information about issues that individuals with disabilities may encounter accessing web content or mobile apps or to request assistance. Providing this information will help public entities to ensure that they are satisfying their obligations to provide equal access, effective communication, and reasonable modifications.

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<sup>[132]</sup> See §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

Commenters also suggested other possible revisions to the exception. Commenters recommended various changes that would cause conventional electronic documents covered by the exception to become accessible over time. For example, commenters suggested that if a public entity makes a copy of a preexisting conventional electronic document covered by the exception conform to WCAG 2.1 Level AA in response to a request from an individual with a disability, the public entity should replace the inaccessible version posted on its web content or mobile app with the updated accessible version that was sent to the individual; the exception should ultimately expire after a certain amount of time; public entities should be required to remediate preexisting documents over time, initially prioritizing documents that are most important and frequently accessed; or public entities should be required to convert certain documents to HTML format according to the same schedule that other HTML content is made accessible.

The Department already expects the impact of the exception will diminish over time for various reasons. For example, public entities may update the documents covered by the exception, in which case they are no longer "preexisting." In addition, the Department notes that there is nothing in subpart H of this part that would prevent public entities from taking steps, such as those identified by commenters, to make preexisting conventional electronic documents conform to WCAG 2.1 Level AA. In fact, public entities might find it beneficial to do so.

One commenter recommended that the exception should apply to all preexisting conventional electronic documents regardless of how they are used by members of the public. The Department does not believe this approach is advisable because it has the potential to cause a significant accessibility gap for individuals with disabilities if public entities rely on conventional electronic documents that are not regularly updated or changed. This could result in inconsistent access to web content and mobile apps and therefore less predictability for people with disabilities in terms of what to expect when accessing public entities' web content and mobile apps.

One public entity recommended that the exception should also apply to preexisting documents posted on a public entity's web content or mobile apps after the date the public entity is required to comply with subpart H of this part if the documents are of historical value and were only minimally altered before posting. One goal of the exception is to assist public entities in focusing their personnel and financial resources on developing new web content and mobile apps that are accessible as defined under subpart H. Therefore, the exception neither applies to content that is newly added to a public entity's web content or mobile app after the date the public entity is required to comply with subpart H nor to preexisting content that is updated after that date. The Department notes that if a public entity wishes to post archival documents, such as the types of documents described by the commenter, after the date the public entity is required to comply with subpart H, the public entity should assess whether the documents can be archived under § 35.201(a), depending on the facts. In particular, the definition of "archived web content" in § 35.104 includes web content posted to an archive after the date a public entity is required to comply with subpart H only if the web content was created before the date the public entity is required to comply with subpart H, reproduces paper documents created before the date the public entity is required to comply with subpart H, or reproduces the contents of other physical media created before the date the public entity is required to comply with subpart H.

Several commenters also requested clarification about how the exception applies to preexisting conventional electronic documents that are created by a third party on behalf of a public entity or hosted on a third party's web content or mobile apps on behalf of a public entity. As previously discussed, the Department made general changes to § 35.200 that address public entities' contractual, licensing, or other arrangements with third parties. The Department clarified that the general requirements for web content and mobile app accessibility apply when a public entity provides or makes available web content or mobile apps, directly or through contractual, licensing, or other arrangements. The same is also true for the application of this exception. Therefore, preexisting conventional electronic documents that a public entity provides or makes available, directly or through contractual, licensing, or

other arrangements, would be subject to subpart H of this part, and the documents would be covered by this exception unless they are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities.

## Third-Party Content

Public entities' web content or mobile apps can include or link to many different types of content created by someone other than the public entity, some of which is posted by or on behalf of public entities and some of which is not. For example, many public entities' websites contain content created by third parties, like scheduling tools, reservations systems, or payment systems. Web content or content in mobile apps created by third parties may also be posted by members of the public on a public entity's online message board or other sections of the public entity's content that allow public comment. In addition to content created by third parties that is posted on the public entity's own web content or content in mobile apps, public entities frequently provide links to third-party content (*i.e.*, links on the public entity's website to content that has been posted on another website that does not belong to the public entity), including links to outside resources and information.

Subpart H of this part requires web content and mobile apps created by third parties to comply with § 35.200 if the web content and mobile apps are provided or made available due to contractual, licensing, or other arrangements with the public entity. In other words, web content and mobile apps that are created or posted on behalf of a public entity fall within the scope of § 35.200. Where a public entity links to third-party content but the third-party content is truly unaffiliated with the public entity and not provided on behalf of the public entity due to contractual, licensing, or other arrangements, the linked content falls outside the scope of § 35.200. Additionally, due to the exception in § 35.201(c), content posted by a third party on an entity's web content or mobile app falls outside the scope of § 35.200, unless the third party is posting due to contractual, licensing, or other arrangements with the public entity.

The Department has heard a variety of views regarding whether public entities should be responsible for ensuring that third-party content on their websites and linked third-party content are accessible as defined by § 35.200. Some maintain that public entities cannot be held accountable for third-party content on their websites, and without such an exception, public entities may have to remove the content altogether. Others have suggested that public entities should not be responsible for third-party content and linked content unless that content is necessary for individuals to access public entities' services, programs, or activities. The Department has also heard the view, however, that public entities should be responsible for third-party content because a public entity's reliance on inaccessible third-party content can prevent people with disabilities from having equal access to the public entity's own services, programs, or activities. Furthermore, boundaries between web content generated by a public entity and by a third party are often difficult to discern.

In anticipation of these concerns, the Department originally proposed two limited exceptions related to third-party content in the NPRM. After review of the public's comments to those exceptions and the comments related to third-party content generally, the Department is proceeding with one of those exceptions in subpart H of this part, as described in the following paragraph. As further explained elsewhere in this appendix, the Department notes that it eliminates redundancy to omit the previously proposed exception for third-party content linked from a public entity's website, but it does not change the scope of content that is required to be made accessible under subpart H.

## Content Posted by a Third Party

Section 35.201(c) provides an exception to the web and mobile app accessibility requirements of § 35.200 for content posted by a third party, unless the third party is posting due to contractual, licensing, or other arrangements with the public entity. Section 35.201 includes this exception in recognition of the fact that individuals other than a public entity's agents sometimes post content on a public entity's web content and mobile apps. For example, members of the public may sometimes post on a public entity's online message boards, wikis, social media, or other web forums, many of which are unmonitored, interactive spaces designed to promote the sharing of information and ideas. Members of the public may post frequently, at all hours of the day or night, and a public entity may have little or no control over the content posted. In some cases, a public entity's website may include posts from third parties dating back many years, which are likely of limited, if any, relevance today. Because public entities often lack control over this third-party content, it may be challenging (or impossible) for them to make it accessible. Moreover, because this third-party content may be outdated or less frequently accessed than other content, there may be only limited benefit to requiring public entities to make this content accessible. Accordingly, the Department believes an exception for this content is appropriate. However, while this exception applies to web content or content in mobile apps posted by third parties, it does not apply to the tools or platforms the public uses to post third-party content on a public entity's web content or content in mobile apps, such as message boards—these tools and platforms generally must conform to the technical standard in subpart H of this part.

This exception applies to, among other third-party content, documents filed by independent third parties in administrative, judicial, and other legal proceedings that are available on a public entity's web content or mobile apps. This example helps to illustrate why the Department believes this exception is necessary. Many public entities have either implemented or are developing an automated process for electronic filing of documents in administrative, judicial, or legal proceedings in order to improve efficiency in the collection and management of these documents. Courts and other public entities receive high volumes of filings in these sorts of proceedings each year. Documents are often submitted by third parties—such as a private attorney in a legal case or other members of the public—and those documents often include appendices, exhibits, or other similar supplementary materials that may be difficult to make accessible.

However, the Department notes that public entities have existing obligations under title II of the ADA to ensure the accessibility of their services, programs, or activities.<sup>[133]</sup> Accordingly, for example, if a person with a disability is a party to a case and requests access to inaccessible filings submitted by a third party in a judicial proceeding that are available on a State court's website, the court generally must timely provide those filings in an accessible format. Similarly, public entities generally must provide reasonable modifications to ensure that individuals with disabilities have access to the public entities' services, programs, or activities. For example, if a hearing had been scheduled in the proceeding referenced in this paragraph, the court might need to postpone the hearing if the person with a disability was not provided filings in an accessible format before the scheduled hearing.

Sometimes a public entity itself chooses to post content created by a third party on its website. The exception in § 35.201(c) does not apply to content posted by the public entity itself, or posted on behalf of the public entity due to contractual, licensing, or other arrangements, even if the content was originally created by a third party. For example, many public entities post third-party content on their websites, such as calendars, scheduling tools, maps, reservations systems, and payment systems that were developed by an outside technology company. Sometimes a third party might even build a public entity's website template on the public entity's behalf. To the extent a public entity chooses to rely on third-party content on its website in these ways, it must select third-party content that

[133] See, e.g., §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

meets the requirements of § 35.200. This is because a public entity may not delegate away its obligations under the ADA.<sup>[134]</sup> If a public entity relies on a contractor or another third party to post content on the public entity's behalf, the public entity retains responsibility for ensuring the accessibility of that content. To provide another example, if a public housing authority relies on a third-party contractor to collect online applications on the third-party contractor's website for placement on a waitlist for housing, the public housing authority must ensure that this content is accessible.

The Department has added language to the third-party posted exception in § 35.201(c) to make clear that the exception does not apply where a third party is posting on behalf of the public entity. The language in § 35.201(c) provides that the exception does not apply if the third party is posting due to contractual, licensing, or other arrangements with the public entity. The Department received many comments expressing concern with how this exception as originally proposed could have applied in the context of third-party vendors and other entities acting on behalf of the public entity. The Department added language to make clear that the exception only applies where the third-party posted content is independent from the actions of the public entity—that is, where there is no arrangement under which the third party is acting on behalf of the public entity. If such an arrangement exists, the third-party content is not covered by the exception and must be made accessible in accordance with subpart H of this part. This point is also made clear in language the Department added to the general requirements of § 35.200, which provides that public entities shall ensure web content and mobile apps that the public entities provide or make available, directly or through contractual, licensing, or other arrangements, are readily accessible to and usable by individuals with disabilities.<sup>[135]</sup> The Department decided to add the same clarification to the exception for third-party posted content because this is the only exception in § 35.201 that applies solely based upon the identity of the poster (whereas the other exceptions identify the type of content at issue), and the Department believes clarity about the meaning of “third party” in the context of this exception is critical to avoid the exception being interpreted overly broadly. The Department believes this clarification is justified by the concerns raised by commenters.

On another point, some commenters expressed confusion about when authoring tools and other embedded content that enables third-party postings would need to be made accessible. The Department wishes to clarify that while the exception for third-party posted content applies to that content which is posted by an independent third party, the exception does not apply to the authoring tools and embedded content provided by the public entity, directly or through contractual, licensing, or other arrangements. Because of this, authoring tools, embedded content, and other similar functions provided by the public entity that facilitate third-party postings are not covered by this exception and must be made accessible in accordance with subpart H of this part. Further, public entities should consider the ways in which they can facilitate accessible output of third-party content through authoring tools and guidance. Some commenters suggested that the Department should add regulatory text requiring public entities to use authoring tools that generate compliant third-party posted content. The Department declines to adopt this approach at this time because the technical standard adopted by subpart H is WCAG 2.1 Level AA, and the Department believes the commenters' proposed approach would go beyond that standard. The Department

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[134] See § 35.130(b)(1)(ii) (prohibiting discrimination through a contractual, licensing, or other arrangement that would provide an aid, benefit, or service to a qualified individual with a disability that is not equal to that afforded others).

[135] See *supra* section-by-section analysis of § 35.200(a)(1) and (2) and (b)(1) and (2).

believes going beyond the requirements of WCAG 2.1 Level AA in this way would undermine the purpose of relying on an existing technical standard that web developers are already familiar with, and for which guidance is readily available, which could prove confusing for public entities.

The Department received many comments either supporting or opposing the exception for content posted by a third party. Public entities and trade groups representing public accommodations generally supported the exception, and disability advocates generally opposed the exception. Commenters supporting the exception argued that the content covered by this exception would not be possible for public entities to remediate since they lack control over unaffiliated third-party content. Commenters in support of the exception also shared that requiring public entities to remediate this content would stifle engagement between public entities and members of the public, because requiring review and updating of third-party postings would take time. Further, public entities shared that requiring unaffiliated third-party web content to be made accessible would in many cases either be impossible or require the public entity to make changes to the third party's content in a way that could be problematic.

Commenters opposing the exception argued that unaffiliated third-party content should be accessible so that individuals with disabilities can engage with their State or local government entities, and commenters shared examples of legal proceedings, development plans posted by third parties for public feedback, and discussions of community grievances or planning. Some of the commenters writing in opposition to the exception expressed concern that content provided by vendors and posted by third parties on behalf of the public entity would also be covered by this exception. The Department emphasizes in response to these commenters that this exception does not apply where a third party such as a vendor is acting on behalf of a public entity, through contractual, licensing, or other arrangements. The Department added language to ensure this point is clear in regulatory text, as explained previously.

After reviewing the comments, the Department emphasizes at the outset the narrowness of this exception—any third-party content that is posted due to contractual, licensing, or other arrangements with the public entity would not be covered by this exception. The Department sometimes refers to the content covered by this exception as “independent” or “unaffiliated” content to emphasize that this exception only applies to content that the public entity has not contracted, licensed, or otherwise arranged with the third party to post. This exception would generally apply, for example, where the public entity enables comments from members of the public on its social media page and third-party individuals independently comment on that post, or where a public entity allows for legal filings through an online portal and a third-party attorney independently submits a legal filing on behalf of their private client (which is then available on the public entity's web content or mobile apps).

The Department has determined that maintaining this exception is appropriate because of the unique considerations relevant to this type of content. The Department takes seriously public entities' concerns that they will often be unable to ensure independent third-party content is accessible because it is outside of their control, and that if they were to attempt to control this content it could stifle communication between the public and State or local government entities. The Department further believes there are unique considerations that could prove problematic with public entities editing or requiring third parties to edit their postings. For example, if public entities were required to add alt text to images or maps in third parties' legal or other filings, it could require the public entity to make decisions about how to describe images or maps in a way that could be problematic from the perspective of the third-party filer. Alternatively, if the public entity were to place this burden on the third-party filer, it could lead to different problematic outcomes. For example, if a public entity rejects a posting from an unaffiliated third party (someone who does not have obligations under subpart H of this part) and requires the third party to update it, the result could be a delay of an emergency or time-sensitive filing or even impeding access to the forum if the third party is unable or does not have the resources to remediate the filing.

The Department understands the concerns raised by the commenters who oppose this exception, and the Department appreciates that the inclusion of this exception means web content posted by third parties may not consistently be accessible by default. The Department emphasizes that even if certain content does not have to conform to the technical standard, public entities still need to ensure that their services, programs, and activities offered using web content and mobile apps are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under title II of the ADA. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the entity's services, programs, or activities.<sup>[136]</sup>

The Department believes the balance this exception strikes thus ensures accessibility to the extent feasible without requiring public entities to take actions that may be impossible or lead to problematic outcomes as described previously. These problematic outcomes include public entities needing to characterize independent third-party content by adding image descriptions, for example, and stifling engagement between public entities and the public due to public entities' need to review and potentially update independent third-party posts, which could lead to delay in posting. Independent third-party content should still be made accessible upon request when required under the existing obligations within title II of the ADA. However, public entities are not required to ensure the accessibility at the outset of independent third-party content. The Department believes, consistent with commenters' suggestions, that reliance solely on the fundamental alteration or undue burdens provisions discussed in the "Duties" section of the section-by-section analysis of § 35.204 would not avoid these problematic outcomes. This is because, for example, even where the public entity may have the resources to make the third-party content accessible (such as by making changes to the postings or blocking posting until the third party makes changes), and even where the public entity does not believe modifying the postings would result in a fundamental alteration in the nature of the service, program, or activity at issue, the problematic outcomes described previously would likely persist. The Department thus believes that this exception appropriately balances the relevant considerations while ensuring access for individuals with disabilities.

Some commenters suggested alternative formulations that would narrow or expand the exception. For example, commenters suggested that the Department limit the exception to advertising and marketing or activities not used to access government services, programs, or activities; mandate that third-party postings providing official comment on government actions still be required to be made accessible; provide alternative means of access as permissible ways of achieving compliance; consider more content as third-party created content; provide for no liability for third-party sourced content; require that emergency information posted by third parties still be accessible; and require that public entities post guidance on making third-party postings accessible. The Department has considered these alternative formulations, and with each proposed alternative the Department found that the proposal would not avoid the problematic outcomes described previously, would result in practical difficulties to implement and define, or would be too expansive of an exception in that too much content would be inaccessible to individuals with disabilities.

Commenters also suggested that the Department include a definition of "third party." The Department is declining to add this definition because the critical factor in determining whether this exception applies is whether the third party is posting due to contractual, licensing, or other arrangements with the public entity, and the Department believes the changes to the regulatory text provide the clarity commenters sought. For example, the Department has included language making clear that public entities are responsible for the content of third parties acting on

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<sup>[136]</sup> See §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

behalf of State or local government entities through the addition of the “contractual, licensing, or other arrangements” clauses in the general requirements and in this exception. One commenter also suggested that subpart H of this part should cover third-party creators of digital apps and content regardless of whether the apps and content are used by public entities. Independent third-party providers unaffiliated with public entities are not covered by the scope of subpart H, as they are not title II entities.

Finally, the Department made a change to the exception for third-party posted content from the NPRM to make the exception more technology neutral. The NPRM provided that the exception applies only to “web content” posted by a third party.<sup>[137]</sup> The Department received a comment suggesting that third-party posted content be covered by the exception regardless of whether the content is posted on web content or mobile apps, and several commenters indicated that subpart H of this part should apply the same exceptions across these platforms to ensure consistency in user experience and reduce confusion. For example, if a third party posts information on a public entity's social media page, that information would be available on both the web and on a mobile app. However, without a technology-neutral exception for third-party posted content, that same information would be subject to different requirements on different platforms, which could create perverse incentives for public entities to only make certain content available on certain platforms. To address these concerns, § 35.201(c) includes a revised exception for third-party posted content to make it more technology neutral by clarifying that the exception applies to “content” posted by a third party. The Department believes this will ensure consistent application of the exception whether the third-party content is posted on web content or mobile apps.

## Previously Proposed Exception for Third-Party Content Linked From a Public Entity's Website

In the NPRM, the Department proposed an exception for third-party content linked from a public entity's website. After reviewing public comments on this proposed exception, the Department has decided not to include it in subpart H of this part. The Department agrees with commenters who shared that the exception is unnecessary and would only create confusion. Further, the Department believes that the way the exception was framed in the NPRM is consistent with the way subpart H would operate in the absence of this exception (with some clarifications to the regulatory text), so the fact that this exception is not included in subpart H will not change what content is covered by subpart H. Under subpart H, consistent with the approach in the NPRM, public entities are not responsible for making linked third-party content accessible where they do not provide or make available that content, directly or through contractual, licensing, or other arrangements.

### Exception Proposed in the NPRM

The exception for third-party-linked content that was proposed in the NPRM provided that a public entity would not be responsible for the accessibility of third-party web content linked from the public entity's website unless the public entity uses the third-party web content to allow members of the public to participate in or benefit from the public entity's services, programs, or activities. Many public entities' websites include links to other websites that contain information or resources in the community offered by third parties that are not affiliated with the public entity. Clicking on one of these links will take an individual away from the public entity's website to the website of a

<sup>[137]</sup> 88 FR 52019.

third party. Often, the public entity has no control over or responsibility for a third party's web content or the operation of the third party's website. Accordingly, the proposed regulatory text in the NPRM provided that the public entity would have no obligation to make the content on a third party's website accessible.<sup>[138]</sup> This exception was originally provided to make clear that public entities can continue to provide links to independent third-party web content without making the public entity responsible for the accessibility of the third party's web content.

However, in the NPRM, the Department provided that if the public entity uses the linked third-party web content to allow members of the public to participate in or benefit from the public entity's services, programs, or activities, then the public entity must ensure it only links to third-party web content that complies with the web accessibility requirements of § 35.200. The Department clarified that this approach is consistent with public entities' obligation to make all of their services, programs, and activities accessible to the public, including those that public entities provide through third parties.<sup>[139]</sup>

Most commenters opining on this subject opposed the exception for third-party content linked from a public entity's website, including disability advocates and individuals with disabilities. Commenters raised many concerns with the exception as drafted. Principally, commenters shared that the exception could lead to confusion about when third-party content is covered by subpart H, and that it could result in critical third-party content being interpreted to be excluded from the requirements of § 35.200. Although the Department proposed a limitation to the exception (*i.e.*, a scenario under which the proposed exception would not apply) that would have required linked third-party content to be made accessible when it is used to participate in or benefit from the public entity's services, programs, or activities, commenters pointed out that this limitation would be difficult to apply to third-party content, and that many public entities would interpret the exception to allow them to keep services, programs, and activities inaccessible. Many commenters, including public entities, even demonstrated this confusion through their comments. For example, commenters believed that web content like fine payment websites, zoning maps, and other services provided by third-party vendors on behalf of public entities would be allowed to be inaccessible under this exception. This misinterprets the proposed exception as originally drafted because third-party web content that is used to participate in or benefit from the public entity's services, programs, or activities would have still been required to be accessible as defined under proposed § 35.201 due to the limitation to the exception. But the Department noted that many commenters from disability advocacy groups, public entities, and trade groups representing public accommodations either expressed concern with or confusion about the exception, or demonstrated confusion through inaccurate statements about what content would fall into this exception to the requirements in subpart H of this part.

Further, commenters also expressed concern with relieving public entities of the responsibility to ensure that the links they provide lead to accessible content. Commenters stated that when public entities provide links, they are engaging in activities that would be covered by subpart H of this part. In addition, commenters said that public entities might provide links to places where people can get vaccinations or collect information for tourists, and that these constitute the activities of the public entity. Also, commenters opined that when public entities engage in these activities, they should not be absolved of the responsibility to provide information presented in a non-

[138] 88 FR 52019; see also *id.* at 51969 (preamble text).

[139] 88 FR 51969; see also § 35.130(b)(1)(ii) (prohibiting discrimination through a contractual, licensing, or other arrangement that would provide an aid, benefit, or service to a qualified individual with a disability that is not equal to that afforded others).

discriminatory manner. Commenters said that public entities have control over which links they use when they organize these pages, and that public entities can and should take care to only provide information leading to accessible web content. Commenters stated that in many cases public entities benefit from providing these links, as do the linked websites, and that public entities should thus be responsible for ensuring the accessibility of the linked content. Some commenters added that this exception would have implied that title III entities are permitted to discriminate by keeping their web content inaccessible, though the Department emphasizes in response to these commenters that subpart H does not alter the responsibilities title III entities have with regard to the goods, services, privileges, or activities offered by public accommodations on the web.<sup>[140]</sup> Commenters universally expressed their concern that the content at issue is often inaccessible, accentuating this problem.

Some commenters supported the exception, generally including individuals, public entities, and trade groups representing public accommodations. These commenters contended that the content at issue in this exception should properly be considered "fluff," and that it would be unrealistic to expect tourist or small business promotion to exist through only accessible websites. The Department also received some examples from commenters who supported the exception of web content the commenters inaccurately believed would be covered by the exception, such as highway toll management account websites. The Department would have likely considered that type of content to be required to comply with § 35.200, even with the exception, due to the limitation to the third-party-linked exception as proposed in the NPRM. Many of the comments the Department received on this proposed exception demonstrated confusion with how the third-party-linked exception and its limitation as proposed in the NPRM would apply in practice, which would lead to misconceptions in terms of when public entities must ensure conformance to WCAG 2.1 and what kinds of content individuals with disabilities can expect to be accessible.

## Approach to Linked Third-Party Content in Subpart H of This Part

After reviewing public comments, the Department believes that inclusion of this exception is unnecessary, would result in confusion, and that removing the exception more consistently aligns with the language of title II of the ADA and the Department's intent in proposing the exception in the NPRM.

Consistent with what many commenters opined, the Department believes that the proper analysis is whether an entity has directly, or through contractual, licensing, or other arrangements, provided or made available the third-party content. This means that, for example, when a public entity posts links to third-party web content on the public entity's website, the links located on the public entity's website and the organization of the public entity's website must comply with § 35.200. Further, when a public entity links to third-party web content that is provided by the public entity, directly or through contractual, licensing, or other arrangements, the public entity is also responsible for ensuring the accessibility of that linked content. However, when public entities link to third-party websites, unless the public entity has a contractual, licensing, or other arrangement with the website to provide or make available content, those third-party websites are not covered by title II of the ADA, because they are not services, programs, or activities provided or made available by public entities, and thus public entities are not responsible for the accessibility of that content.

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<sup>[140]</sup> See U.S. Dep't of Just., *Guidance on Web Accessibility and the ADA*, ADA.gov (Mar. 18, 2022), <https://www.ada.gov/resources/web-guidance/> [<https://perma.cc/WH9E-VTCY>].

Rather than conduct a separate analysis under the proposed exception in the NPRM, the Department believes the simpler and more legally consistent approach is for public entities to assess whether the linked third-party content reflects content that is covered under subpart H of this part to determine their responsibility to ensure the accessibility of that content. If that content is covered, it must be made accessible in accordance with the requirements of § 35.200. For example, if a public entity allows the public to pay for highway tolls using a third-party website, that website would be a service that the public entity provides through arrangements with a third party, and the toll payment website would need to be made accessible consistent with subpart H. However, if the content is not provided or made available by a public entity, directly or through contractual, licensing, or other arrangements, even though the public entity linked to that content, the public entity would not be responsible for making that content accessible. The public entity would still need to ensure the links themselves are accessible, but not the unaffiliated linked third-party content. For example, if a public entity has a tourist information website that provides a link to a private hotel's website, then the public entity would need to ensure the link to that hotel is accessible, because the link is part of the web content of the public entity. The public entity would, for example, need to ensure that the link does not violate the minimum color contrast ratio by being too light of a color blue against a light background, which would make it inaccessible to certain individuals with disabilities.<sup>[141]</sup> However, because the hotel website itself is private and is not being provided on behalf of the public entity due to a contractual, licensing, or other arrangement, the public entity would not be responsible for ensuring the hotel website's ADA compliance.<sup>[142]</sup>

The Department believes that this approach is consistent with what the Department sought to achieve by including the exception in the NPRM, so this modification to subpart H of this part from the proposal in the NPRM does not change the web content that is ultimately covered by subpart H. Rather, the Department believes that removing the exception will alleviate the confusion expressed by many commenters and allow public entities to make a more straightforward assessment of the coverage of the web content they provide to the public under subpart H. For example, a public entity that links to online payment processing websites offered by third parties to accept the payment of fees, parking tickets, or taxes must ensure that the third-party web content it links to in order for members of the public to pay for the public entity's services, programs, or activities complies with the web accessibility requirements of § 35.200. Similarly, if a public entity links to a third-party website that processes applications for benefits or requests to sign up for classes or programs the public entity offers, the public entity is using the third party's linked web content as part of the public entity's services, programs, or activities, and the public entity must thus ensure that it links to only third-party web content that complies with the requirements of § 35.200.

The Department considered addressing commenters' confusion by providing more guidance on the proposed exception, rather than removing the exception. However, the Department believes that the concept of an exception for this type of content, when that content would not be covered by title II in the first place, would make the exception especially prone to confusion, such that including it in subpart H of this part even with further explanation would be insufficient to avoid confusion. The Department believes that because the content at issue would

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<sup>[142]</sup> The Department reminds the public, however, that the hotel would still have obligations under title III of the ADA. See U.S. Dep't of Just., *Guidance on Web Accessibility and the ADA*, ADA.gov (Mar. 18, 2022), <https://www.ada.gov/resources/web-guidance/> [<https://perma.cc/WH9E-VTCY>].

<sup>[141]</sup> See W3C, *Web Content Accessibility Guidelines 2.1, Contrast (Minimum)* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#contrast-minimum> [<https://perma.cc/VAA3-TYN9>].

generally not be covered by title II in the first place, including this exception could inadvertently cause public entities to assume that the exception is broader than it is, which could result in the inaccessibility of content that is critical to accessing public entities' services, programs, or activities.

The Department also reviewed proposals by commenters to both narrow and expand the language of the exception proposed in the NPRM. Commenters suggested narrowing the exception by revising the limitation to cover information that "enables or assists" members of the public to participate in or benefit from services, programs, or activities. Commenters also proposed expanding the exception by allowing third-party web content to remain inaccessible if there is no feasible manner for the content to be made compliant with the requirements of § 35.200 or by removing the limitation. Several commenters made additional alternative proposals to both narrow and expand the language of the exception. The Department has reviewed these alternatives and is still persuaded that the most prudent approach is removing the exception altogether, for the reasons described previously.

## External Mobile Apps

Many public entities use mobile apps that are developed, owned, and operated by third parties, such as private companies, to allow the public to access the public entity's services, programs, or activities. This part of the section-by-section analysis refers to mobile apps that are developed, owned, and operated by third parties as "external mobile apps."<sup>[143]</sup> For example, members of the public use external mobile apps to pay for parking in a city (e.g., "ParkMobile" app<sup>[144]</sup>) or to submit non-emergency service requests such as fixing a pothole or a streetlight (e.g., "SeeClickFix" app<sup>[145]</sup>). In subpart H of this part, external mobile apps are subject to § 35.200 in the same way as mobile apps that are developed, owned, and operated by a public entity. The Department is taking this approach because such external apps are generally made available through contractual, licensing, or other means, and this approach ensures consistency with existing ADA requirements that apply to other services, programs, and activities that a public entity provides in this manner. Consistent with these principles, if a public entity, directly or through contractual, licensing, or other arrangements, provides or makes available an external mobile app, that mobile app must comply with § 35.200 unless it is subject to one of the exceptions outlined in § 35.201.

The Department requested feedback on the external mobile apps that public entities use to offer their services, programs, or activities and received comments on its approach to external mobile apps. Commenters pointed out that external mobile apps are used for a variety of purposes by public entities, including for public information, updates on road conditions, transportation purposes, information on recreation, class information, map-based tools for finding specific information like air quality, and emergency planning, among other things.

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[145] See *Using Mobile Apps in Government*, IBM Ctr. for the Bus. of Gov't, at 32-33 (2015), <https://www.businessofgovernment.org/sites/default/files/Using%20Mobile%20Apps%20in%20Government.pdf> [<https://perma.cc/248X-8A6C>].

[144] See ParkMobile Parking App, <https://parkmobile.io> [<https://perma.cc/G7GY-MDFE>].

[143] The Department does not use the term "third-party" to describe mobile apps in this section to avoid confusion. It is the Department's understanding that the term "third-party mobile app" may have a different meaning in the technology industry, and some understand "a third-party app" as an application that is provided by a vendor other than the manufacturer of the device or operating system provider. See Alice Musyoka, *Third-Party Apps*, Webopedia (Aug. 4, 2022), <https://www.webopedia.com/definitions/third-party-apps/> [<https://perma.cc/SBW3-RGN>].

Commenters overwhelmingly supported the Department's position to not include a wholesale exception for every external mobile app, given how often these apps are used in public entities' services, programs, and activities. As commenters noted, the public's reliance on mobile devices makes access to external apps critical, and commenters shared their belief that the usage of mobile devices, like smartphones, will increase in the coming years. For example, some commenters indicated that many individuals with disabilities, especially those with vision disabilities, primarily rely on smartphones rather than computers, and if mobile apps are not accessible, then people who are blind or have low vision would need to rely on others to use apps that include sensitive data like bank account information. Accordingly, commenters argued there should be little, if any, difference between the information and accessibility provided using a mobile app and a conventional web browser, and if the Department were to provide an exception for external mobile apps, commenters said that there would be a large loophole for accessibility because so many members of the public rely on external mobile apps to access a public entity's services, programs, or activities.

Some commenters sought clarity on the scope of external mobile apps that might be covered by subpart H of this part, such as whether apps used to vote in an election held by a public entity would be covered. Under subpart H, external mobile apps that public entities provide or make available, including apps used in a public entity's election, would be covered by subpart H. As discussed in the section-by-section analysis of § 35.200, subpart H applies to a mobile app even if the public entity does not create or own the mobile app, if there is a contractual, licensing, or other arrangement through which the public entity provides or makes the mobile app available to the public.

Some commenters raised concerns with applying accessibility standards to external mobile apps that a public entity provides or makes available, directly or through contractual, licensing, or other arrangements. Specifically, commenters indicated there may be challenges related to costs, burdens, and cybersecurity with making these apps accessible and, because external mobile apps are created by third-party vendors, public entities may have challenges in ensuring that these apps are accessible. Accordingly, some commenters indicated the Department should set forth an exception for external mobile apps. Another commenter suggested that the Department should delay the compliance date of subpart H of this part to ensure there is sufficient time for external mobile apps subject to § 35.200 to come into compliance with the requirements in subpart H.

While the Department understands these concerns, the Department believes that the public relies on many public entities' external mobile apps to access public entities' services, programs, or activities, and setting forth an exception for these apps would keep public entities' services, programs, or activities inaccessible in practice for many individuals with disabilities. The Department believes that individuals with disabilities should not be excluded from these government services because the external mobile apps on which public entities rely are inaccessible. In addition, this approach of applying ADA requirements to services, programs, or activities that a public entity provides through a contractual, licensing, or other arrangement with a third party is consistent with the existing framework in title II of the ADA.<sup>[146]</sup> Under this framework, public entities have obligations in other title II contexts where they choose to contract, license, or otherwise arrange with third parties to provide services, programs, or activities.<sup>[147]</sup>

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[147] For example, under title II, a State is required to make sure that the services, programs, or activities offered by a State park inn that is operated by a private entity under contract with the State comply with title II. See 56 FR 35694, 35696 (July 26, 1991).

[146] See § 35.130(b)(1) and (3).

With respect to concerns about an appropriate compliance date, the section-by-section analysis of § 35.200 addresses this issue. The Department believes the compliance dates in subpart H of this part will provide sufficient time for public entities to ensure they are in compliance with the requirements of subpart H. Further lengthening the compliance dates would only further extend the time that individuals with disabilities remain excluded from the same level of access to public entities' services, programs, and activities through mobile apps.

## Previously Proposed Exceptions for Password-Protected Class or Course Content of Public Educational Institutions

In the NPRM, the Department proposed exceptions to the requirements of § 35.200 for certain password-protected class or course content of public elementary, secondary, and postsecondary institutions.<sup>[148]</sup> For the reasons discussed in this section, the Department has decided not to include these exceptions in subpart H of this part.<sup>[149]</sup> Accordingly, under subpart H, password-protected course content will be treated like any other content and public educational institutions will generally need to ensure that that content complies with WCAG 2.1 Level AA starting two or three years after the publication of the final rule, depending on whether the public educational institution is covered by § 35.200(b)(1) or (2).

### Course Content Exceptions Proposed in the NPRM

The NPRM included two proposed exceptions for password-protected class or course content of public educational institutions. The first proposed exception, which was included in the NPRM as proposed § 35.201(e),<sup>[150]</sup> stated that the requirements of § 35.200 would not apply to course content available on a public entity's password-protected or otherwise secured website for admitted students enrolled in a specific course offered by a public postsecondary institution.<sup>[151]</sup> Although the proposed exception applied to password-protected course content, it did not apply to the Learning Management System platforms on which public educational institutions make content available.<sup>[152]</sup>

This proposed exception was cabined by two proposed limitations, which are scenarios under which the proposed exception would not apply. The first such limitation provided that the proposed exception would not apply if a public entity is on notice that an admitted student with a disability is pre-registered in a specific course offered by a public

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<sup>[149]</sup> Some commenters asked for clarification about how the proposed course content exceptions would operate in practice. For example, one commenter asked for clarification about what it would mean for a public educational institution to be "on notice" about the need to make course content accessible for a particular student, one of the limitations proposed in the NPRM. Because the Department is eliminating the course content exceptions from subpart H of this part, these questions about how the exceptions would have operated are moot and are not addressed in subpart H.

<sup>[148]</sup> See 88 FR 52019.

<sup>[152]</sup> *Id.* at 51970.

<sup>[151]</sup> 88 FR 52019.

<sup>[150]</sup> Section 35.201(e) no longer refers to a course content exception, but now refers to a different exception for preexisting social media posts, as discussed in this section.

postsecondary institution and that the student, because of a disability, would be unable to access the content available on the public entity's password-protected or otherwise secured website for the specific course.<sup>[153]</sup> In those circumstances, the NPRM proposed, all content available on the public entity's password-protected or otherwise secured website for the specific course must comply with the requirements of § 35.200 by the date the academic term begins for that course offering, and new content added throughout the term for the course must also comply with the requirements of § 35.200 at the time it is added to the website.<sup>[154]</sup>

The second limitation to the proposed exception for public postsecondary institutions' course content provided that the exception would not apply once a public entity is on notice that an admitted student with a disability is enrolled in a specific course offered by a public postsecondary institution after the start of the academic term and that the student, because of a disability, would be unable to access the content available on the public entity's password-protected or otherwise secured website for the specific course.<sup>[155]</sup> In those circumstances, the NPRM proposed, all content available on the public entity's password-protected or otherwise secured website for the specific course must comply with the requirements of § 35.200 within five business days of such notice, and new content added throughout the term for the course must also comply with the requirements of § 35.200 at the time it is added to the website.<sup>[156]</sup>

The second proposed course content exception, which was included in the NPRM as § 35.201(f), proposed the same exception as proposed § 35.201(e), but for public elementary and secondary schools. The proposed exception also contained the same limitations and timing requirements as the proposed exception for public postsecondary schools, but the limitations to the exception would have applied not only when there was an admitted student with a disability enrolled in the course whose disability made them unable to access the course content, but also when there was a parent with a disability whose child was enrolled in the course and whose disability made them unable to access the course content.<sup>[157]</sup>

The Department proposed these exceptions in the NPRM based on its initial assessment that it might be too burdensome to require public educational institutions to make accessible all of the course content that is available on password-protected websites, particularly given that content can be voluminous and that some courses in particular terms may not include any students with disabilities or students whose parents have disabilities. However, the Department recognized in the NPRM that it is critical for students with disabilities to have access to course content for the courses in which they are enrolled; the same is true for parents with disabilities in the context of public elementary and secondary schools. The Department therefore proposed procedures that a public educational institution would have to follow to make course content accessible on an individualized basis once the institution was on notice that there was a student or parent who needed accessible course content because of a disability. Because of the need to ensure prompt access to course content, the Department proposed to require public educational institutions to act quickly upon being on notice of the need for accessible content; public entities

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[154] *Id.*

[153] *Id.* at 52019.

[156] *Id.*

[155] *Id.*

[157] *Id.*

would have been required to provide accessible course content either by the start of the term if the institution was on notice before the date the term began, or within five business days if the institution was on notice after the start of the term.

The Department stated in the NPRM that it believed the proposed exceptions for password-protected course content struck the proper balance between meeting the needs of students and parents with disabilities while crafting a workable standard for public entities, but it welcomed public feedback on whether alternative approaches might strike a more appropriate balance.<sup>[158]</sup> The Department also asked a series of questions about whether these exceptions were necessary or appropriate.<sup>[159]</sup> For example, the Department asked how difficult it would be for public educational institutions to comply with subpart H of this part in the absence of these exceptions, what the impact of the exceptions would be on individuals with disabilities, how long it takes to make course content accessible, and whether the Department should consider an alternative approach.<sup>[160]</sup>

## Public Comments on Proposed Course Content Exceptions

The overwhelming majority of comments on this topic expressed opposition to the course content exceptions as proposed in the NPRM. Many commenters suggested that the Department should take an alternative approach on this issue; namely, the exceptions should not be included in subpart H of this part. Having reviewed the public comments and given careful additional consideration to this issue, the Department has decided not to include these exceptions in subpart H. The public comments supported the conclusion that the exceptions would exacerbate existing educational inequities for students and parents with disabilities without serving their intended purpose of meaningfully alleviating burdens for public educational institutions.

### Infeasibility for Public Educational Institutions

Many commenters, including some commenters affiliated with public educational institutions, asserted that the course content exceptions and limitations as proposed in the NPRM would not be workable for schools, and would almost inevitably result in delays in access to course content for students and parents with disabilities. Commenters provided varying reasons for these conclusions.

Some commenters argued that because making course content accessible often takes time and intentionality to implement, it is more efficient and effective for public educational institutions to create policies and procedures to make course content accessible proactively, without waiting for a student with a disability (or student with a parent with a disability) to enroll and then making content accessible reactively.<sup>[161]</sup> Some commenters pointed out that although the Department proposed the course content exceptions in an effort to make it easier for public educational institutions to comply with subpart H of this part, the exceptions would in fact likely result in more work for entities struggling to remediate content on the back end.

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[160] *Id.* at 51973, 51974, 51976.

[159] *Id.* at 51973, 51974, 51976.

[158] *Id.* at 51973, 51976.

Commenters noted that in many cases, public educational institutions do not generate course content themselves, but instead procure such content through third-party vendors. As a result, some commenters stated, public educational institutions may be dependent on vendors to make their course content accessible, many of which are unable or unwilling to respond to ad hoc requests for accessibility within the expedited time frames that would be required to comply with the limitations to the proposed exceptions. Some commenters argued that it is more efficient and effective to incentivize third-party vendors to make course content produced for public educational institutions accessible on the front end. Otherwise, some commenters contended, it may fall to individual instructors to scramble to make course content accessible at the last minute, regardless of those instructors' background or training on making content accessible, and despite the fact that many instructors already have limited time to devote to teaching and preparing for class. One commenter noted that public educational institutions can leverage their contracting power to choose only to work with third-party vendors that can offer accessible content. This commenter noted that there is precedent for this approach, as many universities and college stores already leverage their contracting power to limit participation in certain student discount programs to third-party publishers that satisfy accessibility requirements. Some commenters suggested that rulemaking in this area will spur vendors, publishers, and creators to improve the accessibility of their offerings.

Some commenters also observed that even if public educational institutions might be able to make a subset of content accessible within the compressed time frames provided under the proposed exceptions, it could be close to impossible for institutions to do so for all course content for all courses, given the wide variation in the size and type of course content. Some commenters noted that content for science, technology, engineering, and mathematics courses may be especially difficult to remediate under the expedited time frames provided under the proposed exceptions. Some commenters indicated that it is more effective for public educational institutions to conduct preparations in advance to make all materials accessible from the start. One commenter asserted that remediating materials takes, on average, twice as long as developing materials that are accessible from the start. Some commenters also pointed out that it might be confusing for public educational institutions to have two separate standards for the accessibility of course content depending on whether there is a student (or student with a parent) with a disability in a particular course.

Many commenters took particular issue with the five-day remediation time frame for course content when a school becomes on notice after the start of the term that there is a student or parent with a disability who needs accessible course content. Some commenters argued that this time frame was too short for public entities to ensure the accessibility of all course content for a particular course, while simultaneously being too long to avoid students with disabilities falling behind. Some commenters noted that the five-day time frame would be particularly problematic for short courses that occur during truncated academic terms, which may last only a small number of days or weeks.

Some commenters also argued that the course content exceptions would create a series of perverse incentives for public educational institutions and the third-party vendors with whom they work, such as incentivizing institutions to neglect accessibility until the last minute and attempt to rely on the fundamental alteration or undue burdens limitations more frequently when they are unable to comply as quickly as required under subpart H of this part. Some commenters also contended that the course content exceptions would undermine public educational institutions' settled expectations about what level of accessibility is required for course content and would cause the institutions that already think about accessibility proactively to regress to a more reactive model. Some

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[161] Many comments on this topic indicated that they were drawing from the philosophy of "universal design." See, e.g., 29 U.S.C. 3002(19).

commenters asserted that because the course content exceptions would cover only password-protected or otherwise secured content, the exceptions would also incentivize public educational institutions to place course content behind a password-protected wall, thereby making less content available to the public as a whole.

Some commenters asserted that if the exceptions were not included in subpart H of this part, the existing fundamental alteration and undue burdens limitations would provide sufficient protection for public educational institutions. One commenter also suggested that making all course content accessible would offer benefits to public educational institutions, as accessible content often requires less maintenance than inaccessible content and can more readily be transferred between different platforms or accessed using different tools. This commenter contended that by relying on accessible content, public educational institutions would be able to offer better services to all students, because accessible content is more user friendly and provides value for all users.

Some commenters pointed out that there are other factors that will ease the burden on public educational institutions of complying with subpart H of this part without the course content exceptions proposed in the NPRM. For example, one commenter reported that elementary and secondary curriculum materials are generally procured at the district level. Thus, course content is generally the same for all schools in a given district. This commenter argued that school districts could therefore address the accessibility of most course materials for all schools in their district at once by making digital accessibility an evaluation criterion in their procurement process.

## Impact on Individuals With Disabilities

As noted elsewhere in this appendix, many commenters asserted that the course content exceptions proposed in the NPRM could result in an untenable situation in which public educational institutions would likely be unable to fully respond to individualized requests for accessible materials, potentially leading to widespread noncompliance with the technical standard and delays in access to course content for students and parents with disabilities. Many commenters emphasized the negative impact that this situation would have on individuals with disabilities.

Some commenters highlighted the pervasive discrimination that has affected generations of students with disabilities and prevented them from obtaining equal access to education, despite existing statutory and regulatory obligations. As one recent example, some commenters cited studies conducted during the COVID-19 pandemic that demonstrated inequities in access to education for students with disabilities, particularly in the use of web-based educational materials.<sup>[162]</sup> Commenters stated that due to accessibility issues, students with disabilities have sometimes been unable to complete required assignments, needed continuous support from others to complete their work, and as a result have felt frustrated, discouraged, and excluded. Some commenters also reported that some students with disabilities have dropped a class, taken an incomplete, or left their academic program altogether because of the inaccessibility of their coursework. Some commenters argued that the proposed course content exceptions would exacerbate this discouraging issue and would continue to exclude students with disabilities from equally accessing an education and segregate them from their classmates.

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<sup>[162]</sup> Arielle M. Silverman et al., *Access and Engagement III: Reflecting on the Impacts of the COVID-19 Pandemic on the Education of Children Who Are Blind or Have Low Vision*, Am. Found. for the Blind (June 2022), [https://afb.org/sites/default/files/2022-06/AFB\\_AccessEngagement\\_III\\_Report\\_Accessible\\_FINAL.pdf](https://afb.org/sites/default/files/2022-06/AFB_AccessEngagement_III_Report_Accessible_FINAL.pdf) (A Perma archive link was unavailable for this citation.); L. Penny Rosenblum et al., *Access and Engagement II: An Examination of How the COVID-19 Pandemic Continued to Impact Students with Visual Impairments, Their*

Some commenters contended that the proposed exceptions would perpetuate the status quo by inappropriately putting the onus on students (or parents) with disabilities to request accessible materials on an individualized basis. Some commenters asserted that this can be problematic because some individuals may not recognize that they have an accessibility need that their school could accommodate and because requesting accessible materials is sometimes burdensome and results in unfair stigma or invasions of privacy. Some commenters noted that this may result in students or parents with disabilities not requesting accessible materials. Some commenters also argued that because these proposed exceptions would put public educational institutions in a reactionary posture and place burdens on already-overburdened instructors, some instructors and institutions might view requesting students as an inconvenience, in spite of their obligations not to discriminate against those students. One commenter noted that constantly having to advocate for accessibility for years on end can be exhausting for students with disabilities and damaging to their self-esteem, sense of belonging, and ability to engage in academic exploration.

Some commenters also noted that the structure of the proposed exceptions would be in significant tension with the typical structure of a public educational institution's academic term. For example, some commenters noted that students, particularly students at public postsecondary institutions, often have the opportunity to electronically review course syllabi and materials and "shop" the first sessions(s) of a particular course to determine whether they wish to enroll, enroll in a course late, or drop a course. Commenters stated that because these processes typically unfold quickly and early in the academic term, the proposed course content exceptions would make it hard or impossible for students with disabilities to take advantage of these options that are available to other students. Commenters also noted that the course content exceptions could interfere with students' ability to transfer to a new school in the middle of a term.

Some commenters also stated many other ways in which the delays in access to course content likely resulting from these exceptions could disadvantage students with disabilities. Some commenters noted that even if public educational institutions were able to turn around accessible materials within the compressed time frames provided under the proposed exceptions—an unlikely result, for the reasons noted elsewhere in this appendix—students with disabilities still might be unable to access course materials as quickly as would be needed to fully participate in their courses. For example, some commenters stated that because students are often expected to complete reading assignments before the first day of class, it is problematic that the proposed exceptions did not require public educational institutions to make course content accessible before the first day of class for students who preregister. Some commenters also observed that because some students with disabilities do not file accessibility requests until after the start of the academic term, it would be impossible to avoid delays in access to course materials under the exceptions. Some commenters also noted that students are often expected to collaborate on assignments, and even a brief delay in access to course material could make it challenging or impossible for students with disabilities to participate in that collaborative process.

Some commenters argued that in the likely outcome that schools are unable to provide accessible course content as quickly as the proposed limitations to the exceptions would require, the resulting delays could cause students with disabilities to fall behind in course readings and assignments, sometimes forcing them to withdraw from or fail

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*Families, and Professionals Nine Months Later, Am. Found. for the Blind (May 2021), [https://static.afb.org/legacy/media/AFB\\_AccessEngagement\\_II\\_Accessible\\_F2.pdf?\\_ga=2.176468773.1214767753](https://static.afb.org/legacy/media/AFB_AccessEngagement_II_Accessible_F2.pdf?_ga=2.176468773.1214767753) [https://perma.cc/H5P4-JZAB]; see also L. Penny Rosenblum et al., *Access and Engagement: Examining the Impact of COVID-19 on Students Birth-21 with Visual Impairments, Their Families, and Professionals in the United States and Canada*, Am. Found. for the Blind (Oct. 2020), [https://afb.org/sites/default/files/2022-03/AFB\\_Access\\_Engagement\\_Report\\_Revised-03-2022.pdf](https://afb.org/sites/default/files/2022-03/AFB_Access_Engagement_Report_Revised-03-2022.pdf) [https://perma.cc/T3AY-ULAQ].*

the course. Some commenters noted that even if students were able to rely on others to assist them in reviewing inaccessible course materials, doing so is often slower and less effective, and can have a negative emotional effect on students, undermining their senses of independence and self-sufficiency.

Some commenters took particular issue with the proposed exception for postsecondary course content. For example, some commenters asserted that it is often more onerous and complicated for students with disabilities to obtain accessible materials upon request in the postsecondary context, given that public postsecondary schools are not subject to the same obligations as public elementary and secondary institutions to identify students with disabilities under other laws addressing disability rights in the educational context. Accordingly, those commenters argued, the proposed exceptions might be especially harmful for postsecondary students with disabilities.

Other commenters argued that the proposed exception for elementary and secondary course content was especially problematic because it would affect virtually every child with a disability in the country. Some commenters contended that this exception would undermine the requirements of other laws addressing disability rights in the educational context. Some commenters also noted that in the elementary and secondary school context, password-protected course sites often enable parents to communicate with their children's teachers, understand what their children are learning, keep track of any potential issues related to their child's performance, review time-sensitive materials like permission slips, and obtain information about important health and safety issues affecting their children. Some commenters opined that the proposed course content exceptions could make it hard or impossible for parents with disabilities to be involved in their children's education in these ways.

Some commenters contended that the proposed course content exceptions would be problematic in the wake of the COVID-19 pandemic, which has led to a rise in purely online courses. One commenter pointed out that students with disabilities may be more likely to enroll in purely online courses for a variety of reasons, including that digital content tends to be more flexible and operable with assistive devices, and it is therefore especially important to ensure that online courses are fully accessible. At least one commenter also stated that the proposed course content exceptions would have treated students—some of whom pay tuition—less favorably than the general public with respect to accessible materials.

Although the Department anticipated that the limitations to the proposed course content exceptions would naturally result in course materials becoming accessible over time, some commenters took issue with that prediction. Some commenters argued that because there is significant turnover in instructors and course content, and because the proposed limitations to the exceptions did not require content to remain accessible once a student with a disability was no longer in a particular course, the limitations to the exceptions as drafted in the NPRM would not be likely to ensure a fully accessible future in this area.

## Limited Support for Course Content Exceptions

Although many commenters expressed opposition to the course content exceptions, some commenters, including some commenters affiliated with public educational institutions, expressed support for some form of exception for course content. Some commenters argued that it would be very challenging or infeasible for public educational institutions to comply with subpart H of this part in the absence of an exception, particularly when much of the content is controlled by third-party vendors. Some commenters also noted that public educational institutions may be short-staffed and have limited resources to devote towards accessibility. Some commenters stated that frequent turnover in faculty may make it challenging to ensure that faculty members are trained on accessibility issues. One commenter pointed out that requiring schools to make all course content accessible may present challenges for professors, some of whom are accustomed to being able to select course content without regard to its

accessibility. Notably, however, even among those commenters who supported the concept of an exception, many did not support the exceptions as drafted in the NPRM, in part because they did not believe the proposed remediation time frames were realistic.

## Approach to Course Content in Subpart H of This Part

Having reviewed the public comments, the Department believes it is appropriate to, as many commenters suggested, not include the previously proposed course content exceptions in subpart H of this part. For many of the reasons noted by commenters, the Department has concluded that the proposed exceptions would not meaningfully ease the burden on public educational institutions and would significantly exacerbate educational inequities for students with disabilities. The Department has concluded that the proposed exceptions would have led to an unsustainable and infeasible framework for public entities to make course content accessible, which would not have resulted in reliable access to course content for students with disabilities. As many commenters noted, it would have been extremely burdensome and sometimes even impossible for public educational institutions to comply consistently with the rapid remediation time frames set forth in the limitations to the proposed exceptions in the NPRM, which would likely have led to widespread delays in access to course content for students with disabilities. While extending the remediation time frames might have made it more feasible for public educational institutions to comply under some circumstances, this extension would have commensurately delayed access for students with disabilities, which would have been harmful for the many reasons noted by commenters. The Department believes that it is more efficient and effective for public educational institutions to use the two- or three-year compliance time frame to prepare to make course content accessible proactively, instead of having to scramble to remediate content reactively.

Accordingly, under subpart H of this part, password-protected course content will be treated like any other content and will generally need to conform to WCAG 2.1 Level AA. To the extent that it is burdensome for public educational institutions to make all of their content, including course content, accessible, the Department believes subpart H contains a series of mechanisms that are designed to make it feasible for these institutions to comply, including the delayed compliance dates discussed in § 35.200, the other exceptions discussed in § 35.201, the provisions relating to conforming alternate versions and equivalent facilitation discussed in §§ 35.202 and 35.203, the fundamental alteration and undue burdens limitations discussed in § 35.204, and the approach to measuring compliance with § 35.200 discussed in § 35.205.

## Alternative Approaches Considered

There were some commenters that supported retaining the proposed course content exceptions with revisions. Commenters suggested a wide range of specific revisions, examples of which are discussed in this section. The Department appreciates the variety of thoughtful approaches that commenters proposed in trying to address the concerns that would arise under the previously proposed course content exceptions. However, for the reasons noted in this section, the Department does not believe that the commenters' proposed alternatives would avoid the issues associated with the exceptions proposed in the NPRM. In addition, although many commenters suggested requiring public entities to follow specific procedures to comply with subpart H of this part, the sheer variety of proposals the Department received from commenters indicates the harm from being overly prescriptive in how public educational institutions comply with subpart H. Subpart H provides educational institutions with the flexibility to determine how best to bring their content into compliance within the two or three years they have to begin complying with subpart H.

Many commenters suggested that the Department should require all new course content to be made accessible more quickly, while providing a longer time period for public entities to remediate existing course content. There were a wide range of proposals from commenters about how this could be implemented. Some commenters suggested that the Department could set up a prioritization structure for existing content, requiring public educational institutions to prioritize the accessibility of, for example, entry-level course content; content for required courses; content for high-enrollment courses; content for courses with high rates of dropage, withdrawal, and failing grades; content for the first few weeks of all courses; or, in the postsecondary context, content in academic departments in which students with disabilities have decided to major.

The Department does not believe this approach would be feasible. Treating new course content differently than existing course content could result in particular courses being partially accessible and partially inaccessible, which could be confusing for both educational institutions and students, and make it challenging for students with disabilities to have full and timely access to their courses. Moreover, even under this hybrid approach, the Department would presumably need to retain remediation time frames for entities to meet upon receiving a request to make existing course content accessible. For the reasons discussed in this section, it would be virtually impossible to set forth a remediation time frame that would provide public educational institutions sufficient time to make content accessible without putting students with disabilities too far behind their peers. In addition, given the wide variation in types of courses and public educational institution structures, it would be difficult to set a prioritization structure for existing content that would be workable across all such institutions.

Some commenters suggested that the Department should set an expiration date for the course content exceptions. The Department does not believe this would be a desirable solution because the problems associated with the proposed exceptions—namely the harm to individuals with disabilities stemming from delayed access to course content and the likely infeasibility of complying with the expedited time frames set forth in the limitations to the exceptions—would likely persist during the lifetime of the exceptions.

Some commenters suggested that the Department could retain the exceptions and accompanying limitations but revise their scope. For example, commenters suggested that the Department could revise the limitations to the exceptions to require public educational institutions to comply only with the WCAG 2.1 success criteria relevant to the particular student requesting accessible materials. Although this might make it easier for public educational institutions to comply in the short term, this approach would still leave public entities in the reactionary posture that so many other commenters criticized in this context and would dramatically reduce the speed at which course content would become accessible to all students. As another example, some commenters recommended that instead of creating exceptions for all password-protected course content, the Department could create exceptions from complying with particular WCAG 2.1 success criteria that may be especially onerous. The Department does not believe this piecemeal approach is advisable, because it would result in course content being only partially accessible, which would reduce predictability for individuals with disabilities. This approach could also make it confusing for public entities to determine the applicable technical standard. Some commenters suggested that the Department should require public entities to prioritize certain types of content that are simpler to remediate. Others suggested that the Department could require certain introductory course documents, like syllabi, to be accessible across the board. One commenter suggested that the Department require public educational institutions to make 20 percent of their course materials accessible each semester. The Department believes that these types of approaches would present similar issues as those discussed in this paragraph and would result in courses being only partially accessible, which would reduce predictability for individuals with disabilities and clarity for public entities. These approaches would also limit the flexibility that public entities have to bring their content into compliance in the order that works best for them during the two or three years they have to begin complying with subpart H of this part.

Some commenters suggested that the Department should revise the remediation timelines in the limitations to the course content exceptions. For example, one commenter suggested that the five-day remediation time frame should be reduced to three days. Another commenter suggested the five-day remediation time frame could be expanded to 10 to 15 days. Some commenters suggested that the time frame should be fact-dependent and should vary depending on factors such as how often the class meets and the type of content. Others recommended that the Department not adopt a specific required remediation time frame, but instead provide that a 10-business-day remediation time frame would be presumptively permissible.

The conflicting comments on this issue illustrate the challenges associated with setting remediation time frames in this context. If the Department were to shorten the remediation time frames, it would make it even harder for public educational institutions to comply, and commenters have already indicated that the previously proposed remediation time frames would not be workable for those institutions. If the Department were to lengthen the remediation time frames, it would further exacerbate the inequities for students with disabilities that were articulated by commenters. The Department believes the better approach is to not include the course content exceptions in subpart H of this part to avoid the need for public educational institutions to make content accessible on an expedited time frame on the back end, and to instead require public entities to treat course content like any other content covered by subpart H.

Some commenters suggested that the Department should take measures to ensure that once course content is accessible, it stays accessible, including by requiring institutions to regularly conduct course accessibility checks. Without the course content exceptions proposed in the NPRM, the Department believes these commenters' concerns are addressed because course content will be treated like all other content under § 35.200, which requires public entities to ensure on an ongoing basis that the web content and mobile apps they provide or make available are readily accessible to and usable by individuals with disabilities.

Some commenters suggested that the Department should give public educational institutions additional time to comply with subpart H of this part beyond the compliance time frames specified in § 35.200(b). The Department does not believe this would be appropriate. Although the requirement for public educational institutions to provide accessible course content and comply with title II is not new, this requirement has not resulted in widespread equal access for individuals with disabilities to public entities' web content and mobile apps. Giving public educational institutions additional time beyond the two- to three-year compliance time frames set forth in § 35.200(b) would potentially prolong the exclusion of individuals with disabilities from certain educational programs, which would be especially problematic given that some of those programs last only a few years in total, meaning that individuals with disabilities might, for example, be unable to access their public university's web content and mobile apps for the entire duration of their postsecondary career. While access to public entities' web content and mobile apps is important for individuals with disabilities in all contexts, it is uniquely critical to the public educational experience for students with disabilities, because exclusion from that content and those apps would make it challenging or impossible for those individuals to keep up with their peers and participate in their courses, which could have lifelong effects on career outcomes. In addition, the Department received feedback indicating that the course content offered by many public educational institutions is frequently changing. The Department is therefore not convinced that giving public educational institutions additional time to comply with subpart H would provide meaningful relief to those entities. Public educational institutions will continually need to make new or changed course content accessible after the compliance date. Extending the compliance date would, therefore, provide limited relief while having a significant negative impact on individuals with disabilities. Moreover, regardless of the compliance date of subpart H, public educational institutions have an ongoing obligation to ensure that their services, programs, and activities offered using web content and mobile apps are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under title II of the ADA.<sup>[163]</sup> Accordingly, even if the Department were to further delay the compliance time frames for public educational

institutions, those institutions would not be able to simply defer all accessibility efforts in this area. The Department also believes it is appropriate to treat public educational institutions the same as other public entities with respect to compliance time frames, which will promote consistency and predictability for individuals with disabilities. Under this approach, some public educational institutions will qualify as small public entities and will be entitled to an extra year to comply, while other public educational institutions in larger jurisdictions will need to comply within two years.

Some commenters recommended that the Department give public educational institutions more flexibility with respect to their compliance with subpart H of this part. For example, some commenters suggested that the Department should give public educational institutions additional time to conduct an assessment of their web content and mobile apps and develop a plan for achieving compliance. Some commenters suggested the Department should give public educational institutions flexibility to stagger their compliance as they see fit and to focus on the accessibility of those materials that they consider most important. The Department does not believe such deference is appropriate. As history has demonstrated, requiring entities to comply with their nondiscrimination obligations without setting clear and predictable standards for when content must be made accessible has not resulted in widespread web and mobile app accessibility. The Department therefore believes it is critical to establish clear and consistent requirements for public entities to follow in making their web content and mobile apps accessible.

As noted in the preceding paragraph, although the Department believes it is important to set clear and consistent requirements for public educational institutions, the Department does not believe it is appropriate to be overly prescriptive with respect to the procedures that those institutions must follow to comply with subpart H of this part. Some commenters suggested that the Department should require public educational institutions to take particular steps to comply with subpart H, such as by holding certain trainings for faculty and staff and dedicating staff positions and funding to accessibility. The Department believes it is appropriate to allow public educational institutions to determine how best to allocate their resources, so long as they satisfy the requirements of subpart H.

Some commenters suggested that the Department should adopt a more permissive approach to conforming alternate versions for public educational institutions. Commenters also suggested that the Department allow public educational institutions to provide an equally effective method of alternative access in lieu of directly accessible, WCAG 2.1 Level AA-conforming versions of materials. For the reasons noted in the discussion of § 35.202 in this appendix, the Department believes that permitting public entities to rely exclusively on conforming alternate versions when doing so is not necessary for technical or legal reasons could result in segregation of people with disabilities, which would be inconsistent with the ADA's core principles of inclusion and integration.<sup>[163]</sup> The same rationale would apply to public educational institutions that wish to provide an equally effective method of alternative access to individuals with disabilities.

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[163] See §§ 35.130(b)(1)(ii) and (7) and 35.160.

[164] See, e.g., 42 U.S.C. 12101(a)(2) (finding that society has tended to isolate and segregate individuals with disabilities); § 35.130(b)(1)(iv) (stating that public entities generally may not provide different or separate aids, benefits, or services to individuals with disabilities than is provided to others unless such action is necessary); *id.* § 35.130(d) (requiring that public entities administer services, programs, and activities in the most integrated setting appropriate).

Some commenters argued that the Department should provide additional resources, funding, and guidance to public educational institutions to help them comply with subpart H of this part. The Department notes that it will issue a small entity compliance guide,<sup>[165]</sup> which should help public educational institutions better understand their obligations under subpart H. The Department also notes that there are free and low-cost training materials available that would help public entities to produce content compliant with WCAG 2.1 Level AA. In addition, although the Department does not currently operate a grant program to assist public entities in complying with the ADA, the Department will consider offering additional technical assistance and guidance in the future to help entities better understand their obligations.

One commenter suggested that the Department should create a list of approved third-party vendors for public educational institutions to use to obtain accessible content. Any such specific list that the Department could provide is unlikely to be helpful given the rapid pace at which software and contractors' availability changes. Public entities may find it useful to consult other publicly available resources that can assist in selecting accessibility evaluation tools and experts.<sup>[166]</sup> Public entities do not need to wait for the Department's guidance before consulting with technical experts and using resources that already exist.

One commenter suggested that the Department should require public educational institutions to offer mandatory courses on accessibility to students pursuing degrees in certain fields, such as computer science, information technology, or computer information systems. This commenter argued that this approach would increase the number of information technology professionals in the future who have the skills to make content accessible. The Department believes this suggestion is outside of the scope of subpart H of this part, which focuses on web and mobile app accessibility under title II. The Department notes that public educational institutions are free to offer such courses if they so choose.

One commenter suggested that if the course content exceptions were retained, the Department should explicitly require public educational institutions to provide clear notice to students with disabilities on whether a particular piece of course content is accessible and how to request accessible materials. The Department believes these concerns are addressed by the decision not to include the course content exceptions in subpart H of this part, which should generally obviate the need for students with disabilities to make individualized requests for course content that complies with WCAG 2.1 Level AA.

Many commenters expressed concern about the extent to which public educational institutions are dependent on third parties to ensure the accessibility of course content, and some commenters suggested that instead of or in addition to regulating public educational institutions, the Department should also regulate the third parties with which those institutions contract to provide course materials. Because subpart H of this part is issued under title II of the ADA, it does not apply to private third parties, and the ultimate responsibility for complying with subpart H rests with public entities. However, the Department appreciates the concerns expressed by commenters that public educational institutions may have limited power to require third-party vendors to make content accessible on an expedited, last-minute basis. The Department believes that not including the course content exceptions in subpart H—coupled with the delayed compliance dates in subpart H—will put public educational institutions in a better position to establish contracts with third-party vendors with sufficient lead time to enable the production of

<sup>[165]</sup> See Public Law 104-121, sec. 212, 110 Stat. at 858.

<sup>[166]</sup> See, e.g., W3C, *Evaluating Web Accessibility Overview*, <https://www.w3.org/WAI/test-evaluate/> [<https://perma.cc/6RDS-X6AR>] (Aug. 1, 2023).

materials that are accessible upon being created. One commenter pointed out that, currently, much of the digital content for courses for public educational institutions is created by a small number of digital publishers. Accordingly, if the rulemaking incentivizes those publishers to produce accessible content, that decision may enable hundreds of public educational institutions to obtain accessible content. The Department also expects that as a result of the rulemaking, there will be an increase in demand for accessible content from third-party vendors, and therefore a likely increase in the number of third-party vendors that are equipped to provide accessible content.

Some commenters also expressed views about whether public educational institutions should be required to make posts by third parties on password-protected course websites accessible. The Department wishes to clarify that, because content on password-protected course websites will be treated like any other content under subpart H of this part, posts by third parties on course websites may be covered by the exception for content posted by a third party. However, that exception only applies where the third party is not posting due to contractual, licensing, or other arrangements with the public entity. Accordingly, if the third party is acting on behalf of the public entity, the third-party posted content exception would not apply. The Department believes that whether particular third-party content qualifies for this exception will involve a fact-specific inquiry.

## Other Issues Pertaining to Public Educational Entities and Public Libraries

In connection with the proposed exceptions for password-protected course content, the Department also asked if there were any particular issues the Department should consider regarding digital books, textbooks, or libraries. The Department received a variety of comments that addressed these topics.

Some commenters raised issues pertaining to intellectual property law. In particular, commenters expressed different views about whether public entities can alter or change inaccessible electronic books created by third-party vendors to make them accessible for individuals with disabilities. Several commenters requested that the Department clarify how intellectual property law applies to subpart H of this part. Subpart H is not intended to interpret or clarify issues related to intellectual property law. Accordingly, the Department declines to make changes to subpart H in response to commenters or otherwise opine about public entities' obligations with respect to intellectual property law. However, as discussed with respect to § 35.202, "Conforming Alternate Versions," there may be some instances in which a public entity is permitted to make a conforming alternate version of web content where it is not possible to make the content directly accessible due to legal limitations.

Some commenters also discussed the EPUB file format. EPUB is a widely adopted format for digital books.<sup>[167]</sup> Commenters noted that EPUBs are commonly used by public entities and that they should be accessible. Commenters also stated that the exceptions for archived web content and preexisting conventional electronic documents at § 35.201(a) and (b), should specifically address EPUBs, or that EPUBs should fall within the meaning of the PDF file format with respect to the definition of "conventional electronic documents" at § 35.104. Commenters also suggested that other requirements should apply to EPUBs, including W3C's EPUB Accessibility 1.1 standard<sup>[168]</sup> and Editor's Draft on EPUB Fixed Layout Accessibility.<sup>[169]</sup>

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<sup>[169]</sup> W3C, EPUB Fixed Layout Accessibility: Editor's Draft (Dec. 8, 2024), <https://w3c.github.io/epub-specs/epub33/fxl-a11y/> [<https://perma.cc/5SP7-VUHJ>].

<sup>[168]</sup> W3C, EPUB Accessibility 1.1: Recommendation (May 25, 2023), <https://www.w3.org/TR/epub-a11y-11/> [<https://perma.cc/48A5-NC2B>].

As discussed with respect to § 35.104, the Department did not change the definition of “conventional electronic documents” because it believes the current exhaustive list strikes the appropriate balance between ensuring access for individuals with disabilities and feasibility for public entities so that they can comply with subpart H of this part. The Department also declines to adopt additional technical standards or guidance specifically related to EPUBs. The WCAG standards were designed to be “technology neutral.”<sup>[170]</sup> This means that they are designed to be broadly applicable to current and future web technologies.<sup>[171]</sup> The Department is concerned that adopting multiple technical standards related to various different types of web content could lead to confusion. However, the Department notes that subpart H allows for equivalent facilitation in § 35.203, meaning that public entities could still choose to apply additional standards specifically related to EPUBs to the extent that the additional standards provide substantially equivalent or greater accessibility and usability as compared to WCAG 2.1 Level AA.

Some commenters also addressed public educational entities' use of digital textbooks in general. Commenters stated that many educational courses use digital materials, including digital textbooks, created by third-party vendors. Consistent with many commenters' emphasis that all educational course materials must be accessible under subpart H of this part, commenters also stated that digital textbooks need to be accessible under subpart H. Commenters stated that third-party vendors that create digital textbooks are in the best position to make that content accessible, and it is costly and burdensome for public entities to remediate inaccessible digital textbooks. While one commenter stated that there are currently many examples of accessible digital textbooks, other commenters stated that many digital textbooks are not currently accessible. A commenter also pointed out that certain aspects of digital books and textbooks cannot be made accessible where the layout and properties of the content cannot be changed without changing the meaning of the content, and they recommended that the Department create exceptions for certain aspects of digital books.

After weighing all the comments, the Department believes the most prudent approach is to treat digital textbooks, including EPUBs, the same as all other educational course materials. The Department believes that treating digital textbooks, including EPUBs, in any other way would lead to the same problems commenters identified with respect to the proposed exceptions for password-protected class or course content. For example, if the Department created a similar exception for digital textbooks, it could result in courses being partially accessible and partially inaccessible for certain time periods while books are remediated to meet the needs of an individual with a disability, which could be confusing for both educational institutions and students with disabilities. Furthermore, as discussed elsewhere in this appendix, it would be virtually impossible to set forth a remediation time frame that would provide public educational institutions sufficient time to make digital textbooks accessible without putting students with disabilities too far behind their peers. Accordingly, the Department did not make any changes to subpart H of this part to specifically address digital textbooks. The Department notes that if there are circumstances where certain aspects of digital textbooks cannot conform to WCAG 2.1 Level AA without changing the meaning of the content, public entities may assess whether the fundamental alteration or undue financial or administrative burdens limitations apply, as discussed in § 35.204. As noted elsewhere in this appendix, the Department also expects that

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<sup>[167]</sup> See W3C, *EPUB 3.3: Recommendation*, § 1.1 Overview (May 25, 2023), <https://www.w3.org/TR/epub-33/> [<https://perma.cc/G2WZ-3M9S>].

<sup>[171]</sup> See W3C, *Understanding Techniques for WCAG Success Criteria* (June 20, 2023), <https://www.w3.org/WAI/WCAG21/Understanding/understanding-techniques> [<https://perma.cc/AMT4-XAAL>].

<sup>[170]</sup> W3C, *Introduction to Understanding WCAG* (June 20, 2023), <https://www.w3.org/WAI/WCAG21/Understanding/intro> [<https://perma.cc/XB3Y-QKU>].

as a result of the rulemaking, there will be an increase in demand for accessible content from third-party vendors, and therefore a likely increase in the number of third-party vendors that are equipped to provide accessible digital textbooks.

Some commenters also discussed circumstances in which public entities seek to modify particular web content to meet the specific needs of individuals with disabilities. One commenter suggested that the Department should provide public entities flexibility to focus on meeting the individual needs of students, rather than simply focusing on satisfying the requirements of WCAG 2.1 Level AA. The Department believes that the title II regulation provides public entities sufficient flexibility to meet the needs of all individuals with disabilities.

The Department also recognizes that IDEA established the National Instructional Materials Access Center (“NIMAC”) in 2004, to assist State educational agencies and local educational agencies with producing accessible instructional materials to meet the specific needs of certain eligible students with disabilities.<sup>[172]</sup> The NIMAC maintains a catalog of source files for K-12 instructional materials saved in the National Instructional Materials Accessibility Standard (“NIMAS”) format, and certain authorized users and accessible media producers may download the NIMAS files and produce accessible instructional materials that are distributed to eligible students with disabilities through State systems and other organizations.<sup>[173]</sup> The Department believes subpart H of this part is complementary to the NIMAC framework. In particular, if a public entity provides or makes available digital textbooks or other course content that conforms to WCAG 2.1 Level AA, but an individual with a disability still does not have equal access to the digital textbooks or other course content, the public entity may wish to assess on a case-by-case basis whether materials derived from NIMAS files can be used to best meet the needs of the individual. Alternatively, a public entity may wish to use materials derived from NIMAS files as a conforming alternate version where it is not possible to make the digital textbook or other course content directly accessible due to technical or legal limitations, consistent with § 35.202.

Some commenters also raised issues relating to public libraries. Commenters stated that libraries have varying levels of resources. Some commenters noted that libraries need additional accessibility training. One commenter requested that the Department identify appropriate accessibility resources and training, and another commenter recommended that the Department should consider allowing variations in compliance time frames for libraries and educational institutions based on their individual needs and circumstances. Commenters noted that digital content available through libraries is often hosted, controlled, or provided by third-party vendors, and libraries purchase subscriptions or licenses to use the material. Commenters stated that it is costly and burdensome for public libraries to remediate inaccessible third-party vendor content. However, one commenter highlighted a number of examples in which libraries at public educational institutions successfully negotiated licensing agreements with third-party vendors that included requirements related to accessibility. Several commenters pointed out that some public libraries also produce content themselves. For example, some libraries participate in the open educational resource movement, which promotes open and free digital educational materials, and some libraries either operate publishing programs or have a relationship with university presses.

After weighing all the comments, the Department believes the most appropriate approach is to treat public libraries the same as other public entities in subpart H of this part. The Department is concerned that treating public libraries in any other way would lead to similar problems commenters identified with respect to the proposed exceptions for

<sup>[173]</sup> Nat'l Instructional Materials Access Center, *About NIMAC*, <https://www.nimac.us/about-nimac/> [<https://perma.cc/9PQ2-GLQM>] (last visited Feb. 2, 2024).

<sup>[172]</sup> Assistance to States for the Education of Children With Disabilities, 85 FR 31374 (May 26, 2020).

password-protected class or course content, especially because some public libraries are connected with public educational entities. With respect to comments about the resources available to libraries and the time frame for libraries to comply with subpart H, the Department also emphasizes that it is sensitive to the need to set a workable standard for all different types of public entities. The Department recognizes that public libraries can vary as much as any other group of public entities covered by subpart H, from small town libraries to large research libraries that are part of public educational institutions. Under § 35.200(b)(2), as under the NPRM, some public libraries will qualify as small public entities and will have an extra year to comply. Subpart H also includes exceptions that are intended to help ensure feasibility for public entities so that they can comply with subpart H and, as discussed in § 35.204, public entities are not required to undertake actions that would represent a fundamental alteration in the nature of a service, program, or activity or impose undue financial and administrative burdens. The Department also notes there that there are free and low-cost training materials available that would help public entities to produce content compliant with WCAG 2.1 Level AA. Accordingly, the Department has not made any changes to subpart H to specifically address public libraries.

Some commenters also noted that public libraries may have collections of materials that are archival in nature, and discussed whether such materials should be covered by an exception. Subpart H of this part contains an exception for archived web content that (1) was created before the date the public entity is required to comply with subpart H, reproduces paper documents created before the date the public entity is required to comply with subpart H, or reproduces the contents of other physical media created before the date the public entity is required to comply with subpart H; (2) is retained exclusively for reference, research, or recordkeeping; (3) is not altered or updated after the date of archiving; and (4) is organized and stored in a dedicated area or areas clearly identified as being archived. In addition, subpart H contains an exception for preexisting conventional electronic documents, unless such documents are currently used to apply for, gain access to, or participate in a public entity's services, programs, or activities. The Department addressed these exceptions in more detail in the section-by-section analysis of § 35.104, containing the definitions of "archived web content" and "conventional electronic documents"; § 35.201(a), the exception for archived web content; and § 35.201(b), the exception for preexisting conventional electronic documents.

## **Individualized, Password-Protected or Otherwise Secured Conventional Electronic Documents**

In § 35.201(d), the Department has set forth an exception to the requirements of § 35.200 for conventional electronic documents that are: (1) about a specific individual, their property, or their account; and (2) password-protected or otherwise secured.

Many public entities use web content and mobile apps to provide access to conventional electronic documents for their customers and other members of the public. For example, some public utility companies provide a website where customers can log in and view a PDF version of their latest bill. Similarly, many public hospitals offer a virtual platform where healthcare providers can send conventional electronic document versions of test results and scanned medical records to their patients. Unlike many other types of content covered by subpart H of this part, these documents are relevant only to an individual member of the public, and in many instances, the individuals who are entitled to view a particular individualized conventional electronic document will not need an accessible version.

While public entities, of course, have existing title II obligations to provide accessible versions of individualized, password-protected or otherwise secured conventional electronic documents in a timely manner when those documents pertain to individuals with disabilities, or otherwise provide the information contained in the documents

to the relevant individual,<sup>[174]</sup> the Department recognizes that it may be too burdensome for some public entities to make all such documents conform to WCAG 2.1 Level AA, regardless of whether the individual to whom the document pertains needs such access. The goal of this exception is to give public entities flexibility to provide such documents, or the information contained within such documents, to the individuals with disabilities to whom they pertain in the manner that the entities determine will be most efficient. Many public entities may retain and produce a large number of individualized, password-protected or otherwise secured conventional electronic documents, and may find that remediating these documents—particularly ones that have been scanned from paper copies—involves a more time- and resource-intensive process than remediating other types of web content. In that scenario, the Department believes that it would be most impactful for public entities to focus their resources on making versions that are accessible to those individuals who need them. However, some public entities may conclude that it is most efficient or effective to make all individualized, password-protected or otherwise secured conventional electronic documents accessible by using, for example, an accessible template to generate such documents, and subpart H of this part preserves flexibility for public entities that wish to take that approach. This approach is consistent with the broader title II regulatory framework. For example, public utility companies are not required to affirmatively mail accessible bills to all customers. Instead, the companies need only provide accessible bills to those customers who need them because of a disability.

This exception is limited to “conventional electronic documents” as defined in § 35.104. This exception would, therefore, not apply in a case where a public entity makes individualized information available in formats other than a conventional electronic document. For example, if a public medical provider makes individualized medical records available on a password-protected web platform as HTML content (rather than a PDF), that content would not be subject to this exception. Those HTML records, therefore, would need to be made accessible in accordance with § 35.200. On the other hand, if a public entity makes individualized records available on a password-protected web platform as PDF documents, those documents would fall under this exception. In addition, although the exception would apply to individualized, password-protected or otherwise secured conventional electronic documents, the exception would not apply to the platform on which the public entity makes those documents available. The public entity would need to ensure that that platform complies with § 35.200. Further, web content and content in mobile apps that does not take the form of individualized, password-protected or otherwise secured conventional electronic documents but instead notifies users about the existence of such documents must still conform to WCAG 2.1 Level AA unless it is covered by another exception. For example, a public hospital's health records portal may include a list of links to download individualized, password-protected PDF medical records. Under WCAG 2.1 Success Criterion 2.4.4, a public entity would generally have to provide sufficient information in the text of the link alone, or in the text of the link together with the link's programmatically determined link context, so that a user could understand the purpose of each link and determine whether they want to access a given document.<sup>[175]</sup>

This exception also only applies when the content is individualized for a specific person or their property or account. Examples of individualized documents include medical records or notes about a specific patient, receipts for purchases (like a parent's receipt for signing a child up for a recreational sports league), utility bills concerning a specific residence, or Department of Motor Vehicles records for a specific person or vehicle. Content that is broadly applicable or otherwise for the general public (i.e., not individualized) is not subject to this exception. For instance, a PDF notice that explains an upcoming rate increase for all utility customers and does not address a specific

<sup>[174]</sup> See §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

<sup>[175]</sup> See W3C, *Understanding SC 2.4.4.: Link Purpose (In Context)* (June 20, 2023), <https://www.w3.org/WAI/WCAG21/Understanding/link-purpose-in-context.html> [<https://perma.cc/RE3T-J9PN>].

customer's particular circumstances would not be subject to this exception. Such a general notice would not be subject to this exception even if it were attached to or sent with an individualized letter, like a bill, that does address a specific customer's circumstances.

This exception applies only to password-protected or otherwise secured content. Content may be otherwise secured if it requires a member of the public to use some process of authentication or login to access the content. Unless subject to another exception, conventional electronic documents that are on a public entity's general, public web platform would not be covered by the exception.

The Department recognizes that there may be some overlap between the content covered by this exception and the exception for certain preexisting conventional electronic documents, § 35.201(b). The Department notes that if web content is covered by the exception for individualized, password-protected or otherwise secured conventional electronic documents, it does not need to conform to WCAG 2.1 Level AA to comply with subpart H of this part, even if the content fails to qualify for another exception, such as the preexisting conventional electronic document exception. For example, a public entity might retain on its website an individualized, password-protected unpaid water bill in a PDF format that was posted before the date the entity was required to comply with subpart H. Because the PDF would fall within the exception for individualized, password-protected or otherwise secured conventional electronic documents, the documents would not need to conform to WCAG 2.1 Level AA, regardless of how the preexisting conventional electronic documents exception might otherwise have applied.

As noted elsewhere in this appendix, while the exception is meant to alleviate the potential burden on public entities of making all individualized, password-protected or otherwise secured conventional electronic documents generally accessible, individuals with disabilities must still be able to access information from documents that pertain to them.<sup>[176]</sup> The Department emphasizes that even if certain content does not have to conform to the technical standard, public entities still need to ensure that their services, programs, and activities offered using web content and mobile apps are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under title II of the ADA. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the entity's services, programs, or activities.<sup>[177]</sup>

The Department received comments expressing both support for and opposition to this exception. A supporter of the exception observed that, because many individualized, password-protected or otherwise secured conventional electronic documents do not pertain to a person with a disability and would never be accessed by a person with a disability, it is unnecessary to require public entities to devote resources to making all of those documents accessible at the outset. Some commenters suggested that it could be burdensome for public entities to make all of these documents accessible, regardless of whether they pertain to a person with a disability. Some commenters noted that even if some public entities might find it more efficient to make all individualized, password-protected or otherwise secured conventional electronic documents accessible from the outset, this exception is valuable because it gives entities flexibility to select the most efficient option to meet the needs of individuals with disabilities.

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<sup>[177]</sup> See *id.*

<sup>[176]</sup> See §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

The Department also received many comments opposing this exception. Commenters pointed out that it is often critical for individuals, including individuals with disabilities, to have timely access to individualized, password-protected or otherwise secured conventional electronic documents, because those documents may contain sensitive, private, and urgently needed information, such as medical test results, educational transcripts, or tax documents. Commenters emphasized the negative consequences that could result from an individual being unable to access these documents in a timely fashion, from missed bill payments to delayed or missed medical treatments. Commenters expressed concern that this exception could exacerbate existing inequities in access to government services for people with disabilities. Commenters argued that it is ineffective and inappropriate to continue to put the burden on individuals with disabilities to request accessible versions of individualized documents, particularly given that many individuals with disabilities may have repeated interactions with different public entities that generate a large number of individualized, password-protected or otherwise secured conventional electronic documents. One commenter contended that the inclusion of this exception is in tension with other statutes and Federal initiatives that are designed to make it easier for individuals to access electronic health information and other digital resources. Commenters contended that public entities often do not have robust, effective procedures under which people can make such requests and obtain accessible versions quickly without incurring invasions of privacy. Commenters argued that it can be cheaper and easier to make individualized conventional electronic documents accessible at the time they are created, instead of on a case-by-case basis, particularly given that many such documents are generated from templates, which can be made accessible relatively easily. Commenters argued that many public entities already make these sorts of documents accessible, pursuant to their longstanding ADA obligations, so introducing this exception might lead some entities to regress toward less overall accessibility. Some commenters suggested that if the exception is retained in subpart H of this part, the Department should set forth specific procedures for public entities to follow when they are on notice of the need to make individualized documents accessible for a particular individual with a disability.

After reviewing the comments, the Department has decided to retain this exception in subpart H of this part.<sup>[178]</sup> The Department continues to believe that public entities often provide or make available a large volume of individualized, password-protected or otherwise secured conventional electronic documents, many of which do not pertain to individuals with disabilities, and it may be difficult to make all such documents accessible. Therefore, the Department believes it is sensible to permit entities to focus their resources on ensuring accessibility for the specific individuals who need accessible versions of those documents. If, as many commenters suggested, it is in fact more efficient and less expensive for some public entities to make all such documents accessible by using a template, there is nothing in subpart H that prevents public entities from taking that approach.

The Department understands the concerns raised by commenters about the potential burdens that individuals with disabilities may face if individualized password-protected or otherwise secured documents are not all made accessible at the time they are created and about the potential negative consequences for individuals with disabilities who do not have timely access to the documents that pertain to them. The Department reiterates that, even when documents are covered by this exception, the existing title II obligations require public entities to furnish appropriate auxiliary aids and services where necessary to ensure an individual with a disability has, for example, an equal opportunity to enjoy the benefits of a service.<sup>[179]</sup> Such auxiliary aids and services could include, for example, providing PDFs that are accessible. In order for such an auxiliary aid or service to ensure effective communication, it must be provided "in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability."<sup>[180]</sup> Whether a particular solution provides effective communication depends on

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<sup>[178]</sup> The Department made a non-substantive change to the header of the exception to match the text of the exception.

circumstances in the interaction, including the nature, length, complexity, and context of the communication.<sup>[181]</sup> For example, the presence of an emergency situation or a situation in which information is otherwise urgently needed would impact what it would mean for a public entity to ensure it is meeting its effective communication obligations. Public entities can help to facilitate effective communication by providing individuals with disabilities with notice about how to request accessible versions of their individualized documents. The Department also notes that where, for example, a public entity is on notice that an individual with a disability needs accessible versions of an individualized, password-protected PDF water bill, that public entity is generally required to continue to provide information from that water bill in an accessible format in the future, and the public entity generally may not require the individual with a disability to make repeated requests for accessibility. Moreover, while individualized, password-protected or otherwise secured conventional electronic documents are subject to this exception, any public-facing, web- or mobile app-based system or platform that a public entity uses to provide or make available those documents, or to allow the public to make accessibility requests, must itself be accessible under § 35.200 if it is not covered by another exception.

The Department also reiterates that a public entity might also need to make reasonable modifications to ensure that a person with a disability has equal access to its services, programs, or activities.<sup>[182]</sup> For example, if a public medical provider has a policy under which administrative support staff are in charge of uploading PDF versions of X-ray images into patients' individualized accounts after medical appointments, but the provider knows that a particular patient is blind, the provider may need to modify its policy to ensure that a staffer with the necessary expertise provides an accessible version of the information the patient needs from the X-ray.

Some commenters suggested that the Department should require public entities to adopt specific procedures when they are on notice of an individual's need for accessible individualized, password-protected or otherwise secured conventional electronic documents. For example, some commenters suggested that public entities should be required to establish a specific process through which individuals with disabilities can "opt in" to receiving accessible documents; to display instructions for how to request accessible versions of documents in specific, prominent places on their websites; to make documents accessible within a specified time frame after being on notice of the need for accessibility (suggested time frames ranged from 5 to 30 business days); or to remediate all documents that are based on a particular template upon receiving a request for remediation of an individualized document based on that template. Although the Department appreciates the need to ensure that individuals with disabilities can obtain easily accessible versions of individualized, password-protected or otherwise secured conventional electronic documents, the Department believes it is appropriate to provide flexibility for a public entity in how it reaches that particular goal on a case-by-case basis, so long as the entity's process satisfies the requirements of title II.<sup>[183]</sup> Moreover, because the content and quantity of individualized, password-protected documents or otherwise secured may vary widely, from a one-page utility bill to thousands of pages of medical records, the Department does not believe it is workable to prescribe a set number of days under which a public

<sup>[181]</sup> *Id.*

<sup>[180]</sup> See § 35.160(b)(2).

<sup>[179]</sup> See § 35.160(b)(1). For more information about public entities' existing obligation to ensure that communications with individuals with disabilities are as effective as communications with others, see U.S. Dep't of Just., ADA Requirements: Effective Communication, ada.gov (Feb 28, 2020), <https://www.ada.gov/resources/effective-communication/> [<https://perma.cc/CLT7-5PNQ>].

<sup>[182]</sup> See § 35.130(b)(7).

entity must make these documents accessible. The wide range of possible time frames that commenters suggested, coupled with the comments the Department received on the remediation time frames that were associated with the previously proposed course content exceptions, helps to illustrate the challenges associated with selecting a specific number of days for public entities to remediate content.

Some commenters suggested other revisions to the exception. For example, some commenters suggested that the Department could limit the exception to existing individualized, password-protected or otherwise secured conventional electronic documents, while requiring newly created documents to be automatically accessible. The Department does not believe it is advisable to adopt this revision. A central rationale of this exception—the fact that many individuals to whom individualized documents pertain do not need those documents in an accessible format—remains regardless of whether the documents at issue are existing or newly created.

One commenter suggested the Department could create an expiration date for the exception. The Department does not believe this would be workable, because the challenges that public entities might face in making all individualized, password-protected or otherwise secured conventional electronic documents accessible across the board would likely persist even after any expiration date. One commenter suggested that the exception should not apply to large public entities, such as States. The Department believes that the rationales underlying this exception would apply to both large and small public entities. The Department also believes that the inconsistent application of this exception could create unpredictability for individuals with disabilities. Other commenters suggested additional revisions, such as limiting the exception to documents that are not based on templates; requiring public entities to remove inaccessible documents from systems of records once accessible versions of those documents have been created; and requiring public entities to use HTML pages, which may be easier to make accessible than conventional electronic documents, to deliver individualized information in the future. The Department believes it is more appropriate to give public entities flexibility in how they provide or make available individualized, password-protected or otherwise secured documents to the public, so long as those entities ensure that individuals with disabilities have timely access to the information contained in those documents in an accessible format that protects the privacy and independence of the individual with a disability.

Some commenters asked the Department for additional clarification about how the exception would operate in practice. One commenter asked for clarification about how this exception would apply to public hospitals and healthcare clinics, and whether the exception would apply when a patient uses a patient portal to schedule an appointment with their provider. The Department wishes to clarify that this exception is not intended to apply to all content or functionality that a public entity offers that is password-protected. Instead, this exception is intended to narrowly apply to individualized, password-protected or otherwise secured conventional electronic documents, which are limited to the following electronic file formats: PDFs, word processor file formats, presentation file formats, and spreadsheet file formats. Content that is provided in any other format is not subject to this exception. In addition, while individualized, password-protected or otherwise secured conventional electronic documents would be subject to the exception, the platform on which those documents are provided would not be subject to the exception and would need to conform to WCAG 2.1 Level AA. Accordingly, in the scenario raised by the commenter, the exception would not apply unless the public hospital or healthcare clinic used an individualized, password-protected or otherwise secured document in one of the file types listed in this paragraph for scheduling appointments.

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[183] See §§ 35.130(b)(1)(ii) and (b)(7) and 35.160(b)(2).

The Department also received some comments that suggested that the Department take actions outside the scope of subpart H of this part to make it easier for certain people with disabilities to access platforms that provide individualized, password-protected or otherwise secured documents. For example, the Department received a comment asking the Department to require public entities to offer “lower tech” platforms that are generally simpler to navigate. While the Department recognizes that these are important issues, they are outside the scope of subpart H, and they are therefore not addressed in detail in subpart H.

## Preexisting Social Media Posts

Subpart H of this part includes an exception in § 35.201(e) for preexisting social media posts, which provides that the requirements of § 35.200 will not apply to a public entity's social media posts that were posted before the date the public entity is required to comply with subpart H. This means that public entities will need to ensure that their social media posts going forward are compliant with the requirements in subpart H beginning on the compliance date outlined in § 35.200(b), but not before that date. The Department includes guidance on public entities' use of social media platforms going forward in the section entitled “Public Entities' Use of Social Media Platforms” in the section-by-section analysis of § 35.200.

The Department is including this exception in subpart H of this part because making preexisting social media posts accessible may be impossible or result in a significant burden. Commenters told the Department that many public entities have posted on social media platforms for several years, often numbering thousands of posts, which may not all be compliant with WCAG 2.1 Level AA. The benefits of making all preexisting social media posts accessible will likely be limited as these posts are generally intended to provide then-current updates on platforms that are frequently refreshed with new information. The Department believes public entities' limited resources are better spent ensuring that current web content and content in mobile apps are accessible, rather than reviewing all preexisting social media posts for compliance or possibly deleting public entities' previous posts if remediation is impossible.

In the NPRM, the Department did not propose any regulatory text specific to the web content and content in mobile apps that public entities make available via social media platforms. However, the Department asked for the public's feedback on adding an exception from coverage under subpart H of this part for a public entity's social media posts if they were posted before the effective date of subpart H.<sup>[184]</sup> After reviewing public comment on this proposed exception, the Department has decided to include an exception in subpart H, which will apply to preexisting social media posts posted before the compliance date of subpart H.

The Department emphasizes that even if preexisting social media posts do not have to conform to the technical standard, public entities still need to ensure that their services, programs, and activities offered using web content and mobile apps are accessible to people with disabilities on a case-by-case basis in accordance with their existing obligations under title II of the ADA. These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the entity's services, programs, and activities.<sup>[185]</sup>

<sup>[184]</sup> 88 FR 51962-51963.

Most commenters supported an exception for preexisting social media posts, including commenters representing public entities and disability advocates. Commenters shared that making preexisting social media posts accessible would require a massive allocation of resources, and that in many cases these posts would be difficult or impossible to remediate. Commenters shared that in practice, public entities may need to delete preexisting social media posts to comply with subpart H of this part in the absence of this exception, which could result in a loss of historical information about public entities' activities.

A few commenters shared alternative approaches to this exception. One commenter suggested that highlighted or so-called "pinned" posts (e.g., social media posts saved at the top of a page) be required to be made accessible regardless of the posting date. Other commenters suggested that the exception should be limited so as not to cover emergency information or information pertinent to accessing core functions, expressing concern that these postings would continue to be inaccessible between publication of the final rule and the date that public entities are required to be in compliance with subpart H of this part.

The Department agrees with the majority of commenters who supported the exception as described in the NPRM, for the reasons shared previously. The Department understands some commenters' concerns with respect to pinned posts as well as concerns with inaccessible postings made after publication of the final rule but before the compliance date. However, the Department believes that the approach provided in subpart H of this part appropriately balances a variety of competing concerns. In particular, the Department is concerned that it would be difficult to define pinned posts given the varied and evolving ways in which different social media platforms allow users to highlight and organize content, such that it could result in confusion. Further, the Department believes that the risk that preexisting pinned posts will stay pinned indefinitely is low, because public entities will likely still want to regularly update their pinned content. Also, requiring these pinned posts to be made accessible risks some of the remediation concerns raised earlier, as public entities may need to delete pinned posts where remediation is infeasible. The Department also has concerns with delineating what content should be considered "core" or "emergency" content.

For these reasons, the Department believes the appropriate approach is to set forth, as it does in § 35.201(e), an exception from the requirements of § 35.200 for all social media posts that were posted prior to the compliance date for subpart H of this part. The Department emphasizes, however, that after the compliance date, public entities must ensure all of their social media posts moving forward comply with subpart H.

In the NPRM, the Department asked for the public's feedback on whether public entities' preexisting videos posted to social media platforms should be covered by an exception due to these same concerns or whether these platforms should otherwise be treated differently. After reviewing public comments with respect to social media, the Department does not believe it is prudent to single out any individual social media platform or subset of content on those platforms for unique treatment under subpart H of this part, as that could lead to confusion and be difficult to implement, especially as social media platforms continually evolve. The Department thus maintains that social media posts must be made accessible under § 35.200 if they are posted after the compliance date of subpart H. The Department recognizes that due to the continually evolving nature of social media platforms, there may be questions about which content is covered by the exception to subpart H. While the Department is choosing not to single out platforms or subsets of platforms in subpart H for unique treatment, the Department encourages public entities to err on the side of ensuring accessibility where there are doubts about coverage, to maximize access for people with disabilities.

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[185] Sections 35.130(b)(1)(ii) and (b)(7) and 35.160.

Commenters also suggested other ways to address social media, such as providing that public entities must create a timeline to incorporate accessibility features into their social media or providing that public entities can use separate accessible pages with all of their social media posts. The Department believes the balance struck with this exception in subpart H of this part is appropriate and gives public entities sufficient time to prepare to make all of their new social media posts accessible in accordance with subpart H after the compliance date, consistent with the other content covered by subpart H. One commenter also requested clarification on when social media posts with links to third-party content would be covered by subpart H. The Department notes that social media posts posted after the compliance date are treated consistent with all other web content and content in mobile apps, and the relevant exceptions may apply depending on the content at issue.

## Section 35.202—Conforming Alternate Versions

Section 35.202 sets forth the approach to “conforming alternate versions.” Under WCAG, a “conforming alternate version” is a separate web page that, among other things, is accessible, up to date, contains the same information and functionality as the inaccessible web page, and can be reached via a conforming page or an accessibility-supported mechanism.<sup>[186]</sup> Conforming alternate versions are allowable under WCAG. For reasons explained in the following paragraphs, the Department believes it is important to put guardrails on when public entities may use conforming alternate versions under subpart H of this part. Section 35.202, therefore, specifies that the use of conforming alternate versions is permitted only in limited, defined circumstances, which represents a slight departure from WCAG 2.1. Section 35.202(a) states that a public entity may use conforming alternate versions of web content to comply with § 35.200 only where it is not possible to make web content directly accessible due to technical or legal limitations.

Generally, to conform to WCAG 2.1, a web page must be directly accessible in that it satisfies the success criteria for one of the defined levels of conformance—in the case of subpart H of this part, Level AA.<sup>[187]</sup> However, as noted in the preceding paragraph, WCAG 2.1 also allows for the creation of a “conforming alternate version.” The purpose of a “conforming alternate version” is to provide individuals with relevant disabilities access to the information and functionality provided to individuals without relevant disabilities, albeit via a separate vehicle. The Department believes that having direct access to accessible web content provides the best user experience for many individuals with disabilities, and it may be difficult to reliably maintain conforming alternate versions, which must be kept up to date. W3C explains that providing a conforming alternate version is intended to be a “fallback option for conformance to WCAG and the preferred method of conformance is to make all content directly accessible.”<sup>[188]</sup> However, WCAG 2.1 does not explicitly limit the circumstances under which an entity may choose to create a conforming alternate version of a web page instead of making the web page directly accessible.

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<sup>[186]</sup> See W3C, *Web Content Accessibility Guidelines (WCAG) 2.1: Recommendation, Conforming Alternate Version* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#dfn-conforming-alternate-version> [<https://perma.cc/GWT6-AMAN>]. WCAG 2.1 provides three options for how a conforming alternate version can be reached—the Department does not modify those options with respect to conforming alternative versions under subpart H of this part.

<sup>[188]</sup> See W3C, *Understanding Conformance*, <https://www.w3.org/WAI/WCAG21/Understanding/conformance> [<https://perma.cc/QSG6-QCBL>] (June 20, 2023).

<sup>[187]</sup> See *id.*

The Department is concerned that WCAG 2.1 can be interpreted to permit the development of two separate versions of a public entity's web content—one for individuals with relevant disabilities and another for individuals without relevant disabilities—even when doing so is unnecessary and when users with disabilities would have a better experience using the main web content that is accessible. Such an approach would result in segregated access for individuals with disabilities and be inconsistent with how the ADA's core principles of inclusion and integration have historically been interpreted.<sup>[189]</sup> The Department is also concerned that the frequent or unbounded creation of separate web content for individuals with disabilities may, in practice, result in unequal access to information and functionality. For example, and as discussed later in this section, the Department is concerned that an inaccessible conforming alternate version may provide information that is outdated or conflicting due to the maintenance burden of keeping the information updated and consistent with the main web content. As another example, use of a conforming alternate version may provide a fragmented, separate, or less interactive experience for people with disabilities because public entities may assume that interactive features are not financially worthwhile or otherwise necessary to incorporate in conforming alternate versions. Ultimately, as discussed later in this section, the Department believes there are particular risks associated with permitting the creation of conforming alternate versions where not necessitated by the presence of technical or legal limitations.

Due to the concerns about user experience, segregation of users with disabilities, unequal access to information, and maintenance burdens mentioned in the preceding paragraph, the Department is adopting a slightly different approach to conforming alternate versions than that provided under WCAG 2.1. Instead of permitting entities to adopt conforming alternate versions whenever they believe it is appropriate, § 35.202(a) states that a public entity may use conforming alternate versions of web content to comply with § 35.200 only where it is not possible to make web content directly accessible due to technical limitations (e.g., technology is not yet capable of being made accessible) or legal limitations (e.g., web content that cannot be changed due to legal reasons). The Department believes conforming alternate versions should be used rarely—when it is truly not possible to make the content accessible for reasons beyond the public entity's control. However, § 35.202 does not prohibit public entities from providing alternate versions of web pages in addition to their WCAG 2.1 Level AA compliant main web page to possibly provide users with certain types of disabilities a better experience.

The Department slightly revised the text that was proposed in the NPRM for this provision.<sup>[190]</sup> To ensure consistency with other provisions of subpart H of this part, the previously proposed text for § 35.202 was revised to refer to “web content” instead of “websites and web content.” W3C’s discussion of conforming alternate versions generally refers to “web pages” and “content.”<sup>[191]</sup> Other provisions of subpart H also refer to “web content.” Introducing the concept of “websites” in this section when the term is not used elsewhere in subpart H could cause unnecessary confusion, so the Department revised this language for consistency. This change is non-substantive, as “web content” encompasses “websites.”

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<sup>[189]</sup> See § 35.130(b)(1)(iv) (stating that public entities generally may not provide different or separate aids, benefits, or services to individuals with disabilities than is provided to others unless such action is necessary); § 35.130(d) (requiring that public entities administer services, programs, and activities in the most integrated setting appropriate); cf. 42 U.S.C. 12101(a)(2) (finding that society has tended to isolate and segregate individuals with disabilities).

<sup>[191]</sup> See W3C, *Web Content Accessibility Guidelines (WCAG) 2.1: Recommendation, Conforming Alternate Version* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#dfn-conforming-alternate-version> [<https://perma.cc/GWT6-AMAN>].

In the NPRM, the Department requested comments on its approach to conforming alternate versions. In response, the Department received comments from a variety of commenters. Several commenters supported the Department's proposed approach of permitting the use of conforming alternative versions only when there are technical or legal limitations. Commenters believed these limitations would prevent public entities from using conforming alternate versions frequently and for reasons that do not seem appropriate, such as creating a conforming alternate version for a web page that is less accessible because of the public entity's aesthetic preferences.

Some commenters suggested that the Department should permit conforming alternate versions under a broader range of circumstances. For example, some commenters indicated that a conforming alternate version could provide an equal or superior version of web content for people with disabilities. Other commenters noted that some private companies can provide manual alternate versions that look the same as the original web page but that have invisible coding and are accessible. One commenter stated that the transition from a public entity's original website to an accessible version can be made seamless. Another commenter noted that WCAG 2.1 permits entities to adopt conforming alternate versions under broader circumstances and argued that the Department should adopt this approach rather than permitting conforming alternate versions only where there are technical or legal limitations. One commenter argued that it could be challenging for public entities that already offer conforming alternate versions more broadly to adjust their approach to comply with subpart H of this part. Some commenters gave examples of scenarios in which they found it helpful or necessary to provide conforming alternate versions.

A few commenters expressed serious concerns about the use of conforming alternate versions. These commenters stated that conforming alternate versions often result in two separate and unequal websites. Commenters indicated that some entities' conforming alternate versions neither conform to WCAG standards nor contain the same functionality and content and therefore provide fragmented, separate experiences that are less useful for people with disabilities. Other commenters shared that these alternate versions are designed in a way that assumes users are people who are blind and thus do not want visual presentation, when other people with disabilities rely on visual presentations to access the web content. Further, one group shared that many people with disabilities may be skeptical of conforming alternative versions because historically they have not been updated, have been unequal in quality, or have separated users by disability. Another commenter argued that unlimited use of conforming alternate versions could lead to errors and conflicting information because there are two versions of the same content. One commenter suggested prohibiting conforming alternate versions when interaction is a part of the online user experience. Another commenter suggested permitting conforming alternate versions only when a legal limitation makes it impossible to make web content directly accessible, but not when a technical limitation makes it impossible to do so.

Having reviewed public comments and considered this issue carefully, the Department believes subpart H of this part strikes the right balance to permit conforming alternate versions, but only where it is not possible to make web content directly accessible due to technical or legal limitations. The Department believes that this approach ensures that generally, people with disabilities will have direct access to the same web content that is accessed by people without disabilities, but it also preserves flexibility for public entities in situations where, due to a technical or legal limitation, it is impossible to make web content directly accessible. The Department also believes that this approach will help avoid the concerns noted in the preceding paragraphs with respect to segregation of people with disabilities by defining only specific scenarios when the use of conforming alternate versions is appropriate.

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[190] 88 FR 52020.

Some commenters emphasized the importance of ensuring that under the limited circumstances in which conforming alternate versions are permissible, those versions provide a truly equal experience. Commenters also expressed concern that it might be hard for people with disabilities to find links to conforming alternate versions. The Department notes that under WCAG 2.1, a conforming alternate version is defined, in part, as a version that “conforms at the designated level”; “provides all of the same information and functionality in the same human language”; and “is as up to date as the non-conforming content.”<sup>[192]</sup> Accordingly, even where it is permissible for a public entity to offer a conforming alternate version under subpart H of this part, the public entity must still ensure that the conforming alternate version provides equal information and functionality and is up to date. WCAG 2.1 also requires that “the conforming version can be reached from the non-conforming page via an accessibility-supported mechanism,” or “the non-conforming version can only be reached from the conforming version,” or “the non-conforming version can only be reached from a conforming page that also provides a mechanism to reach the conforming version.”<sup>[193]</sup> The Department believes these requirements will help to ensure that where a conforming alternate version is permissible, people with disabilities will be able to locate that page.

Some commenters recommended that the Department provide additional guidance and examples of when conforming alternate versions would be permissible, or asked the Department to clarify whether conforming alternate versions would be permissible under particular circumstances. The determination of when conforming alternate versions are needed or permitted varies depending on the facts. For example, a conforming alternate version would not be permissible just because a town's web developer lacked the knowledge or training needed to make content accessible; that would not be a technical limitation within the meaning of § 35.202. By contrast, the town could use a conforming alternate version if its web content included a new type of technology that it is not yet possible to make accessible, such as a specific kind of immersive virtual reality environment. Similarly, a town would not be permitted to claim a legal limitation because its general counsel failed to approve contracts for a web developer with accessibility experience. Instead, a legal limitation would apply when the inaccessible content itself could not be modified for legal reasons specific to that content. The Department believes this approach is appropriate because it ensures that, whenever possible, people with disabilities have access to the same web content that is available to people without disabilities.

One commenter stated that school districts and public postsecondary institutions currently provide accessible alternative content to students with disabilities that is equivalent to the content provided to students without disabilities and that is responsive to the individual student's needs. The commenter argued that public educational institutions should continue to be able to provide these alternative resources to students with disabilities. The Department reiterates that although public educational institutions, like all other public entities, will only be able to provide conforming alternate versions in lieu of directly accessible versions of web content under the circumstances specified in § 35.202, nothing prevents a public educational institution from providing a conforming alternate version in addition to the accessible main version of its web content.

Other commenters requested that the Department impose deadlines or time restrictions on how long a public entity can use a conforming alternate version. However, the Department believes that doing so would conflict with the rationale for permitting conforming alternate versions. Where the technical limitations and legal limitations are truly outside the public entity's control, the Department believes it would be unreasonable to require the public entity to

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[193] *Id.*

[192] See *id.*

surmount those limitations after a certain period of time, even if they are still in place. However, once a technical or legal limitation no longer exists, a public entity must ensure their web content is directly accessible in accordance with subpart H of this part.

A few commenters also sought clarification on, or broader language to account for, the interaction between the allowance of conforming alternate versions under § 35.202 and the general limitations provided in § 35.204. These two provisions are applicable in separate circumstances. If there is a technical or legal limitation that prevents an entity from complying with § 35.200 for certain content, § 35.202 is applicable. The entity can create a conforming alternate version for that content and, under § 35.202, that entity will be in compliance with subpart H of this part. Separately, if a fundamental alteration or undue financial and administrative burdens prevent a public entity from complying with § 35.200 for certain content, § 35.204 is applicable. As set forth in § 35.204, the public entity must still take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity to the maximum extent possible. A public entity's legitimate claim of fundamental alteration or undue burdens does not constitute a legal limitation under § 35.202 for which a conforming alternate version automatically suffices to comply with subpart H. Rather, the public entity must ensure access "to the maximum extent possible" under the specific facts and circumstances of the situation. Under the specific facts a public entity is facing, the public entity's best option to ensure maximum access may be an alternate version of its content, but the public entity also may be required to do something more or something different. Because the language of § 35.204 already allows for alternate versions if appropriate for the facts of public entity's fundamental alteration or undue burdens, the Department does not see a need to expand the language of § 35.202 to address commenters' concerns.

The Department also wishes to clarify the relationship between §§ 35.202 and 35.205, which are analyzed independently of each other. Section 35.202 provides that a public entity may use conforming alternate versions of web content, as defined by WCAG 2.1, to comply with § 35.200 only where it is not possible to make web content directly accessible due to technical or legal limitations. Accordingly, if a public entity does not make its web content directly accessible and instead provides a conforming alternate version when not required by technical or legal limitations, the public entity may not use that conforming alternate version to comply with its obligations under subpart H of this part, either by relying on § 35.202 or by invoking § 35.205.

## Section 35.203 Equivalent Facilitation

Section 35.203 provides that nothing prevents a public entity from using designs, methods, or techniques as alternatives to those prescribed in the regulation, provided that such alternatives result in substantially equivalent or greater accessibility and usability. The 1991 and 2010 ADA Standards for Accessible Design both contain an equivalent facilitation provision.<sup>[194]</sup> The reason for allowing for equivalent facilitation in subpart H of this part is to encourage flexibility and innovation by public entities while still ensuring equal or greater access to web content and mobile apps. Especially in light of the rapid pace at which technology changes, this provision is intended to clarify that public entities can use methods or techniques that provide equal or greater accessibility than subpart H would require. For example, if a public entity wanted to conform its web content or mobile app to a future web content and mobile app accessibility standard that expands accessibility requirements beyond WCAG 2.1 Level AA, this provision makes clear that the public entity would be in compliance with subpart H. Public entities could also choose to comply with subpart H by conforming their web content to WCAG 2.2 Level AA<sup>[195]</sup> because WCAG 2.2 Level AA provides substantially equivalent or greater accessibility and usability to WCAG 2.1 Level AA; in particular, WCAG 2.2 Level AA includes additional success criteria not found in WCAG 2.1 Level AA and every success criterion in WCAG 2.1 Level AA, with the exception of one success criterion that is obsolete.<sup>[196]</sup> Similarly, a public entity could comply with subpart H by conforming its web content and mobile apps to WCAG 2.1 Level AAA,<sup>[197]</sup> which is

the same version of WCAG and includes all the WCAG 2.1 Level AA requirements, but includes additional requirements not found in WCAG 2.1 Level AA for even greater accessibility. For example, WCAG 2.1 Level AAA includes Success Criterion 2.4.10<sup>[198]</sup> for section headings used to organize content and Success Criterion 3.1.4<sup>[199]</sup> that includes a mechanism for identifying the expanded form or meaning of abbreviations, among others. The Department believes that this provision offers needed flexibility for entities to provide usability and accessibility that meet or exceed what subpart H of this part would require as technology continues to develop. The responsibility for demonstrating equivalent facilitation rests with the public entity. Subpart H adopts the approach as proposed in the NPRM,<sup>[200]</sup> but the Department edited the regulatory text to fix a grammatical error by adding a comma in the original sentence in the provision.

The Department received a comment arguing that providing phone support in lieu of a WCAG 2.1-compliant website should constitute equivalent facilitation. As discussed in the section entitled “History of the Department’s Title II Web-Related Interpretation and Guidance,” the Department no longer believes telephone lines can realistically provide equal access to people with disabilities. Websites—and often mobile apps—allow members of the public to get information or request a service within just a few minutes, and often to do so independently. Getting the same information or requesting the same service using a staffed telephone line takes more steps and may result in wait times or difficulty getting the information.

For example, State and local government entities’ web content and mobile apps may allow members of the public to quickly review large quantities of information, like information about how to register for government services, information on pending government ordinances, or instructions about how to apply for a government benefit. Members of the public can then use government web content or mobile apps to promptly act on that information by, for example, registering for programs or activities, submitting comments on pending government ordinances, or filling out an application for a government benefit. A member of the public could not realistically accomplish these tasks efficiently over the phone.

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[200] 88 FR 52020.

[199] See W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 3.1.4 Abbreviations* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#conformance-reqs:~:text=Success%20Criterion%203.1.4,abbreviations%20is%20available> [https://perma.cc/ZK6C-9RHD].

[198] See W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 2.4.10 Section Headings* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#conformance-reqs:~:text=Success%20Criterion%202.4.10,Criterion%204.1.2> [https://perma.cc/9BNS-8LWK].

[197] W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, § 5.2 Conformance Requirements* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#conformance-reqs> [https://perma.cc/XV2E-ESM8].

[196] W3C, *What's New in WCAG 2.2 Draft*, <https://www.w3.org/WAI/standards-guidelines/wcag/new-in-22/> [https://perma.cc/GDM3-A6SE] (Oct. 5, 2023).

[195] W3C, *WCAG 2 Overview*, <https://www.w3.org/WAI/standards-guidelines/wcag/> [https://perma.cc/RQS2-P7JC] (Oct. 5, 2023).

[194] See 28 CFR part 36, appendix D, at 1000 (2022) (1991 ADA Standards); 36 CFR part 1191, appendix B, at 329 (2022) (2010 ADA Standards).

Additionally, a person with a disability who cannot use an inaccessible online tax form might have to call to request assistance with filling out either online or mailed forms, which could involve significant delay, added costs, and could require providing private information such as banking details or Social Security numbers over the phone without the benefit of certain security features available for online transactions. A staffed telephone line also may not be accessible to someone who is deafblind, or who may have combinations of other disabilities, such as a coordination issue impacting typing, and an audio processing disability impacting comprehension over the phone. However, such individuals may be able to use web content and mobile apps that are accessible.

Finally, calling a staffed telephone line lacks the privacy of looking up information on a public entity's web content or mobile app. A caller needing public safety resources, for example, might be unable to access a private location to ask for help on the phone, whereas accessible web content or mobile apps would allow users to privately locate resources. For these reasons, the Department does not now believe that a staffed telephone line—even if it is offered 24/7—provides equal opportunity in the way that accessible web content or mobile apps would.

## Section 35.204 Duties

Section 35.204 sets forth the general limitations on the obligations under subpart H of this part. Section 35.204 provides that in meeting the accessibility requirements set out in subpart H, a public entity is not required to take any action that would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens. These limitations on a public entity's duty to comply with the regulatory provisions mirror the fundamental alteration and undue burdens compliance limitations currently provided in the title II regulation in §§ 35.150(a)(3) (existing facilities) and 35.164 (effective communication), and the fundamental alteration compliance limitation currently provided in the title II regulation in § 35.130(b)(7) (reasonable modifications in policies, practices, or procedures). These limitations are thus familiar to public entities.

The word “full” was removed in § 35.204 so that the text reads “compliance” rather than “full compliance.” The Department made this change because § 35.200(b)(1) and (2) clarifies that compliance with subpart H of this part includes complying with the success criteria and conformance requirements under Level A and Level AA specified in WCAG 2.1. This minor revision does not affect the meaning of § 35.204, but rather removes an extraneous word to avoid redundancy and confusion.

In determining whether an action would result in undue financial and administrative burdens, all of a public entity's resources available for use in the funding and operation of the service, program, or activity should be considered. The burden of proving that compliance with the requirements of § 35.200 would fundamentally alter the nature of a service, program, or activity, or would result in undue financial and administrative burdens, rests with the public entity. As the Department has consistently maintained since promulgation of the title II regulation in 1991, the decision that compliance would result in a fundamental alteration or impose undue burdens must be made by the head of the public entity or their designee, and must be memorialized with a written statement of the reasons for reaching that conclusion.<sup>[201]</sup> The Department has recognized the difficulty public entities have in identifying the official responsible for this determination, given the variety of organizational structures within public entities and their components.<sup>[202]</sup> The Department has made clear that the determination must be made by a high level official, no lower than a Department head, having budgetary authority and responsibility for making spending decisions.<sup>[203]</sup>

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[203] *Id.*

The Department believes, in general, it would not constitute a fundamental alteration of a public entity's services, programs, or activities to modify web content or mobile apps to make them accessible within the meaning of subpart H of this part. However, this is a fact-specific inquiry, and the Department provides some examples later in this section of when a public entity may be able to claim a fundamental alteration. Moreover, like the fundamental alteration or undue burdens limitations in the title II regulation referenced in the preceding paragraphs, § 35.204 does not relieve a public entity of all obligations to individuals with disabilities. Although a public entity under this part is not required to take actions that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, it nevertheless must comply with the requirements of subpart H of this part to the extent that compliance does not result in a fundamental alteration or undue financial and administrative burdens. For instance, a public entity might determine that complying with all of the success criteria under WCAG 2.1 Level AA would result in a fundamental alteration or undue financial and administrative burdens. However, the public entity must then determine whether it can take any other action that would not result in such an alteration or such burdens, but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity to the maximum extent possible. To the extent that the public entity can, it must do so. This may include the public entity's bringing its web content into conformance to some of the WCAG 2.1 Level A or Level AA success criteria.

It is the Department's view that most entities that choose to assert a claim that complying with all of the requirements under WCAG 2.1 Level AA would result in undue financial and administrative burdens will be able to attain at least partial compliance in many circumstances. The Department believes that there are many steps a public entity can take to conform to WCAG 2.1 Level AA that should not result in undue financial and administrative burdens, depending on the particular circumstances.

Complying with the web and mobile app accessibility requirements set forth in subpart H means that a public entity is not required by title II of the ADA to make any further modifications to the web content or content in mobile apps that it makes available to the public. However, it is important to note that compliance with subpart H of this part will not relieve title II entities of their distinct employment-related obligations under title I of the ADA. The Department realizes that the regulations in subpart H are not going to meet the needs of and provide access to every individual with a disability, but believes that setting a consistent and enforceable web accessibility standard that meets the needs of a majority of individuals with disabilities will provide greater predictability for public entities, as well as added assurance of accessibility for individuals with disabilities. This approach is consistent with the approach the Department has taken in the context of physical accessibility under title II. In that context, a public entity is not required to exceed the applicable design requirements of the ADA Standards even if certain wheelchairs or other power-driven mobility devices require a greater degree of accessibility than the ADA Standards provide.<sup>[204]</sup> The entity may still be required, however, to make other modifications to how it provides a program, service, or activity, where necessary to provide access for a specific individual. For example, where an individual with a disability cannot physically access a program provided in a building that complies with the ADA Standards, the public entity does not need to make physical alterations to the building but may need to take other steps to ensure that the individual has an equal opportunity to participate in and benefit from that program.

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[202] 28 CFR part 35, appendix B, at 708 (2022).

[201] Section 35.150(a)(3) and 35.164.

[204] See 28 CFR part 35, appendix A, at 626 (2022).

Similarly, just because an entity is in compliance with the web content or mobile app accessibility standard in subpart H of this part does not mean it has met all of its obligations under the ADA or other applicable laws—it means only that it is not required to make further changes to the web content or content in mobile apps that it makes available. If an individual with a disability, on the basis of disability, cannot access or does not have equal access to a service, program, or activity through a public entity's web content or mobile app that conforms to WCAG 2.1 Level AA, the public entity is still obligated under § 35.200(a) to provide the individual an alternative method of access to that service, program, or activity unless the public entity can demonstrate that alternative methods of access would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.<sup>[205]</sup> The entity also must still satisfy its general obligations to provide effective communication, reasonable modifications, and an equal opportunity to participate in or benefit from the entity's services, programs, or activities.<sup>[206]</sup>

The public entity must determine on a case-by-case basis how best to meet the needs of those individuals who cannot access a service, program, or activity that the public entity provides through web content or mobile apps that comply with all of the requirements under WCAG 2.1 Level AA. A public entity should refer to § 35.130(b)(1)(ii) to determine its obligations to provide individuals with disabilities an equal opportunity to participate in and enjoy the benefits of the public entity's services, programs, or activities. A public entity should refer to § 35.160 (effective communication) to determine its obligations to provide individuals with disabilities with the appropriate auxiliary aids and services necessary to afford them an equal opportunity to participate in, and enjoy the benefits of, the public entity's services, programs, or activities. A public entity should refer to § 35.130(b)(7) (reasonable modifications) to determine its obligations to provide reasonable modifications in policies, practices, or procedures to avoid discrimination on the basis of disability. It is helpful to provide individuals with disabilities with information about how to obtain the modifications or auxiliary aids and services they may need. For example, while not required in subpart H of this part, a public entity is encouraged to provide an email address, accessible link, accessible web page, or other accessible means of contacting the public entity to provide information about issues individuals with disabilities may encounter accessing web content or mobile apps or to request assistance.<sup>[207]</sup> Providing this information will help public entities ensure that they are satisfying their obligations to provide equal access, effective communication, and reasonable modifications.

The Department also clarifies that a public entity's requirement to comply with existing ADA obligations remains true for content that fits under one of the exceptions under § 35.201. For example, in the appropriate circumstances, an entity may be obligated to add captions to a video that falls within the archived content exception and provide the captioned video file to the individual with a disability who needs access to the video, or edit an individualized password-protected PDF to be usable with a screen reader and provide it via a secure method to the individual with a disability. Of course, an entity may also choose to further modify the web content or content in mobile apps it makes available to make that content more accessible or usable than subpart H of this part requires. In the context of the preceding examples, for instance, the Department believes it will often be most economical and logical for an entity to post the captioned video, once modified, as part of web content made available to the public, or to modify the individualized PDF template so that it is used for all members of the public going forward.

<sup>[206]</sup> See *id.*

<sup>[205]</sup> See, e.g., §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

<sup>[207]</sup> See W3C, *Developing an Accessibility Statement*, <https://www.w3.org/WAI/planning/statements/> [<https://perma.cc/85WU-JTJ6>] (Mar. 11, 2021).

The Department received comments indicating that the fundamental alteration or undue burdens limitations as discussed in the “Duties” section of the NPRM<sup>[208]</sup> are appropriate and align with the framework of the ADA. The Department also received comments expressing concern that there are no objective standards to help public entities understand when the fundamental alteration and undue burdens limitations will apply. Accordingly, some commenters asked the Department to make clearer when public entities can and cannot raise these limitations. Some of these commenters said that the lack of clarity about these limitations could result in higher litigation costs or frivolous lawsuits. The Department acknowledges these concerns and notes that fundamental alteration and undue burdens are longstanding limitations under the ADA,<sup>[209]</sup> and therefore the public should already be familiar with these limitations in other contexts. The Department has provided guidance that addresses the fundamental alteration and undue burdens limitations and will consider providing additional guidance in the future.<sup>[210]</sup>

The Department received some comments suggesting that the Department should state whether certain examples amount to a fundamental alteration or undue burdens or amend the regulation to address the examples. For example, one commenter indicated that some digital content cannot be made accessible and therefore technical infeasibility should be considered an undue burden. Another commenter asserted that it may be an undue burden to require large documents that are 300 pages or more to be accessible under the final regulations; therefore, the final regulations should include a rebuttable presumption that public entities do not have to make these larger documents accessible. In addition, one commenter said they believe that testing the accessibility of web content and mobile apps imposes an undue burden. However, another commenter opined that improving web code is unlikely to pose a fundamental alteration in most cases.

Whether the undue burdens limitation applies is a fact-specific assessment that involves considering a variety of factors. For example, some small towns have minimal operating budgets measured in the thousands or tens of thousands of dollars. If such a town had an archive section of its website with a large volume of material gathered by the town's historical society (such as old photographs and handwritten journal entries from town elders), the town would have an obligation under the existing title II regulation to ensure that its services, programs, and activities offered using web content and mobile apps are accessible to individuals with disabilities. However, it might be an undue burden for the town to make all those materials fully accessible in a short period of time in response to a request by an individual with a disability.<sup>[211]</sup> Whether the undue burdens limitation applies, however, would depend, among other things, on how large the town's operating budget is and how much it would cost to make the materials in question accessible. Whether the limitation applies will also vary over time. Increases in town budget, or changes in technology that reduce the cost of making the historical materials accessible, may make the limitation inapplicable. Lastly, even where it would impose an undue burden on the town to make its historical materials accessible within a certain time frame, the town would still need to take any other action that would not result in such a burden but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the town to the maximum extent possible.

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<sup>[210]</sup> See, e.g., U.S. Dep't of Just., *ADA Update: A Primer for State and Local Governments*, <https://www.ada.gov/resources/title-ii-primer/> [<https://perma.cc/ZV66-EFWU>] (Feb. 28, 2020).

<sup>[209]</sup> See §§ 35.130(b)(7)(i), 35.150(a)(3), and 35.164. These regulatory provisions were also in the Department's 1991 regulations at 28 CFR 35.130(b)(7), 35.150(a)(3), and 35.164, respectively.

<sup>[208]</sup> 88 FR 51978-51980.

<sup>[211]</sup> See §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

Application of the fundamental alteration limitation is similarly fact specific. For example, a county library might hold an art contest in which elementary school students submit alternative covers for their favorite books and library goers view and vote on the submissions on the library website. It would likely be a fundamental alteration to require the library to modify each piece of artwork so that any text drawn on the alternative covers, such as the title of the book or the author's name, satisfies the color contrast requirements in the technical standard. Even so, the library would still be required to take any other action that would not result in such an alteration but would nevertheless ensure that individuals with disabilities could participate in the contest to the maximum extent possible.

Because each assessment of whether the fundamental alteration or undue burdens limitations applies will vary depending on the entity, the time of the assessment, and various other facts and circumstances, the Department declines to adopt any rebuttable presumptions about when the fundamental alteration or undue burdens limitations would apply.

One commenter proposed that the final regulations should specify factors that should be considered with respect to the undue burdens limitation, such as the number of website requirements that public entities must comply with and the budget, staff, and other resources needed to achieve compliance with these requirements. The Department declines to make changes to the regulatory text because the Department does not believe listing specific factors would be appropriate, particularly given that these limitations apply in other contexts in title II. Also, as noted earlier, the Department believes that generally, it would not constitute a fundamental alteration of a public entity's services, programs, or activities to modify web content or mobile apps to make them accessible in compliance with subpart H of this part.

The Department received a comment suggesting that the regulatory text should require a public entity claiming the undue burdens limitation to identify the inaccessible content at issue, set a reliable point of contact for people with disabilities seeking to access the inaccessible content, and develop a plan and timeline for remediating the inaccessible content. The Department declines to take this suggested approach because it would be a departure from how the limitation generally applies in other contexts covered by title II of the ADA.<sup>[212]</sup> In these other contexts, if an action would result in a fundamental alteration or undue burdens, a public entity must still take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity to the maximum extent possible.<sup>[213]</sup> The Department believes it is important to apply these longstanding limitations in the same way to web content and mobile apps to ensure clarity for public entities and consistent enforcement of the ADA. In addition, implementing the commenter's suggested approach would create additional costs for public entities. The Department nevertheless encourages public entities to engage in practices that would improve accessibility and ensure transparency when public entities seek to invoke the fundamental alteration or undue burdens limitations. For example, a public entity can provide an accessibility statement that informs the public how to bring web content or mobile app accessibility problems to the public entity's attention, and it can also develop and implement a procedure for reviewing and addressing any such issues raised.

Some commenters raised concerns about the requirement in § 35.204 that the decision that compliance with subpart H of this part would result in a fundamental alteration or in undue financial or administrative burdens must be made by the head of a public entity or their designee. These commenters wanted more clarity about who is the

<sup>[213]</sup> See *id.*

<sup>[212]</sup> See §§ 35.150(a)(3) and 35.164.

head of a public entity. They also expressed concern that this requirement may be onerous for public entities. The Department notes in response to these commenters that this approach is consistent with the existing title II framework in §§ 35.150(a)(3) (service, program, or activity accessibility) and 35.164 (effective communication). With respect to the commenters' concern about who is the head of a public entity or their designee, the Department recognizes the difficulty of identifying the official responsible for this determination given the variety of organizational forms of public entities and their components. The Department has made clear that "the determination must be made by a high level official, no lower than a Department head, having budgetary authority and responsibility for making spending decisions."<sup>[214]</sup> The Department reiterates that this is an existing concept in title II of the ADA, so public entities should be familiar with this requirement. The appropriate relevant official may vary depending on the public entity.

## Section 35.205 Effect of Noncompliance That Has a Minimal Impact on Access

Section 35.205 sets forth when a public entity will be deemed to have complied with § 35.200 despite limited nonconformance to the technical standard. This provision adopts one of the possible approaches to compliance discussed in the NPRM.<sup>[215]</sup> As discussed in this section, public comments indicated that the final rule needed to account for the increased risk of instances of nonconformance to the technical standard, due to the unique and particular challenges to achieving perfect, uninterrupted conformance in the digital space. The Department believes that § 35.205 meets this need, ensuring the full and equal access to which individuals with disabilities are entitled while allowing some flexibility for public entities if nonconformance to WCAG 2.1 Level AA is so minimal as to not affect use of the public entity's web content or mobile app.

## Discussion of Regulatory Text

Section 35.205 describes a particular, limited circumstance in which a public entity will be deemed to have met the requirements of § 35.200 even though the public entity's web content or mobile app does not perfectly conform to the technical standard set forth in § 35.200(b). Section 35.205 will apply if the entity can demonstrate that, although it was technically out of conformance to WCAG 2.1 Level AA (*i.e.*, fails to exactly satisfy a success criterion or conformance requirement), the nonconformance has a minimal impact on access for individuals with disabilities, as defined in the regulatory text. If a public entity can make this showing, it will be deemed to have met its obligations under § 35.200 despite its nonconformance to WCAG 2.1 Level AA.

Section 35.205 does not alter a public entity's general obligations under subpart H of this part nor is it intended as a blanket justification for a public entity to avoid conforming with WCAG 2.1 Level AA from the outset. Rather, § 35.205 is intended to apply in rare circumstances and will require a detailed analysis of the specific facts surrounding the impact of each alleged instance of nonconformance. The Department does not expect or intend that § 35.205 will excuse most nonconformance to the technical standard. Under § 35.200(b), a public entity must typically ensure that the web content and mobile apps it provides or makes available, directly or through contractual,

<sup>[214]</sup> 28 CFR part 35, appendix B, at 708 (2022).

<sup>[215]</sup> 88 FR 51983.

licensing, or other arrangements, comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1. This remains generally true. However, § 35.205 allows for some minor deviations from WCAG 2.1 Level AA if specific conditions are met. This will provide a public entity that discovers that it is out of compliance with the requirements of § 35.200(b) with another means to avoid the potential liability that could result. Public entities that maintain conformance to WCAG 2.1 Level AA will not have to rely on § 35.205 to be deemed compliant with § 35.200, and full conformance to WCAG 2.1 Level AA is the only definitive way to guarantee that outcome. However, if a public entity falls out of conformance in a minimal way or such nonconformance is alleged, a public entity may be able to use § 35.205 to demonstrate that it has satisfied its legal obligations. Section 35.205 also does not alter existing ADA enforcement mechanisms. Individuals can file complaints, and agencies can conduct investigations and compliance reviews, related to subpart H of this part the same way they would for any other requirement under title II.<sup>[216]</sup>

As the text of the provision indicates, the burden of demonstrating applicability of § 35.205 is on the public entity. The provision will only apply in the limited circumstance in which the public entity can demonstrate that all of the criteria described in § 35.205 are satisfied. This section requires the public entity to show that its nonconformance to WCAG 2.1 Level AA has such a minimal impact on access that it would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app as defined in the remainder of the section. If the nonconformance has affected an individual in the ways outlined in § 35.205 (further described in the subsequent paragraphs), the public entity will not be able to rely on this provision. Further, as "demonstrate" indicates, the public entity must provide evidence that all of the criteria described in § 35.205 are satisfied in order to substantiate its reliance on this provision. While § 35.205 does not require a particular type of evidence, a public entity needs to show that, as the text states, its nonconformance "would not affect" the experience of individuals with disabilities as outlined in subsequent paragraphs. Therefore, it would not be sufficient for a public entity to show only that it has not received any complaints regarding the nonconformance; nor would it likely be enough if the public entity only pointed to a few particular individuals with disabilities who were unaffected by the nonconformance. The public entity must show that the nonconformance is of a nature that would not affect people whose disabilities are pertinent to the nonconformance at issue, just as the analysis under other parts of the title II regulation depends on the barrier at issue and the access needs of individuals with disabilities pertinent to that barrier.<sup>[217]</sup> For example, people with hearing or auditory processing disabilities, among others, have disabilities pertinent to captioning requirements.

With respect to the particular criteria that a public entity must satisfy, § 35.205 describes both what people with disabilities must be able to use the public entity's web content or mobile apps to do and the manner in which people with disabilities must be able to do it. As to manner of use, § 35.205 provides that nonconformance to WCAG 2.1 Level AA must not affect the ability of individuals with disabilities to use the public entity's web content or mobile app in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use compared to individuals without disabilities. Timeliness, privacy, and independence are underscored throughout the ADA framework as key components of ensuring equal opportunity for individuals with disabilities to participate in or benefit from a public entity's services, programs, and activities, as explained further later in the discussion of this provision, and "ease of use" is intended to broadly encompass other aspects of a user's experience with web content or mobile apps. To successfully rely on § 35.205, it would not be sufficient for a public entity to demonstrate merely that its nonconformance would not completely block people with disabilities from using web

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<sup>[216]</sup> See §§ 35.170 through 35.190.

<sup>[217]</sup> Cf., e.g., §§ 35.130(b)(1)(iv) and (b)(8) and 35.160.

content or a mobile app as described in § 35.205(a) through (d). That is, the term “would not affect” should not be read in isolation from the rest of § 35.205 to suggest that a public entity only needs to show that a particular objective can be achieved. Rather, a public entity must also demonstrate that, even though the web content or mobile app does not conform to the technical standard, the user experience for individuals with disabilities is substantially equivalent to the experience of individuals without disabilities.

For example, if a State's online renewal form does not conform to WCAG 2.1 Level AA, a person with a manual dexterity disability may need to spend significantly more time to renew their professional license online than someone without a disability. This person might also need to seek assistance from someone who does not have a disability, provide personal information to someone else, or endure a much more cumbersome and frustrating process than a user without a disability. Even if this person with a disability was ultimately able to renew their license online, § 35.205 would not apply because, under these circumstances, their ability to use the web content in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use would be affected. Analysis under this provision is likely to be a fact-intensive analysis. Of course, a public entity is not responsible for every factor that might make a task more time-consuming or difficult for a person with a disability. However, a public entity is responsible for the impact of its nonconformance to the technical standard set forth in subpart H of this part. The public entity must show that its nonconformance would not affect the ability of individuals with pertinent disabilities to use the web content or mobile app in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use.

Paragraphs (a) through (d) of § 35.205 describe what people with disabilities must be able to use the public entity's web content or mobile apps to do in a manner that is substantially equivalent as to timeliness, privacy, independence, and ease of use. First, under § 35.205(a), individuals with disabilities must be able to access the same information as individuals without disabilities. This means that people with disabilities can access all the same information using the web content or mobile app that users without disabilities are able to access. For example, § 35.205(a) would not be satisfied if certain web content could not be accessed using a keyboard because the content was coded in a way that caused the keyboard to skip over some content. In this example, an individual who relies on a screen reader would not be able to access the same information as an individual without a disability because all of the information could not be selected with their keyboard so that it would be read aloud by their screen reader. However, § 35.205(a) might be satisfied if the color contrast ratio for some sections of text is 4.45:1 instead of 4.5:1 as required by WCAG 2.1 Success Criterion 1.4.3.<sup>[218]</sup> Similarly, this provision might apply if the spacing between words is only 0.15 times the font size instead of 0.16 times as required by WCAG 2.1 Success Criterion 1.4.12.<sup>[219]</sup> Such slight deviations from the specified requirements are unlikely to affect the ability of, for example, most people with vision disabilities to access information that they would be able to access if the content fully conformed with the technical standard. However, the entity must always demonstrate that this element is met with respect to the specific facts of the nonconformance at issue.

Second, § 35.205(b) states that individuals with disabilities must be able to engage in the same interactions as individuals without disabilities. This means that people with disabilities can interact with the web content or mobile app in all of the same ways that people without disabilities can. For example, § 35.205(b) would not be satisfied if

<sup>[219]</sup> See W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 1.4.12 Text Spacing* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#text-spacing> [<https://perma.cc/B4A5-843F>].

<sup>[218]</sup> See W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 1.4.3 Contrast (Minimum)* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#contrast-minimum> [<https://perma.cc/4XS3-AX7W>].

people with disabilities could not interact with all of the different components of the web content or mobile app, such as chat functionality, messaging, calculators, calendars, and search functions. However, § 35.205(b) might be satisfied if the time limit for an interaction, such as a chat response, expires at exactly 20 hours, even though Success Criterion 2.2.1,<sup>[220]</sup> which generally requires certain safeguards to prevent time limits from expiring, has an exception that only applies if the time limit is longer than 20 hours. People with certain types of disabilities, such as cognitive disabilities, may need more time than people without disabilities to engage in interactions. A slight deviation in timing, especially when the time limit is long and the intended interaction is brief, is unlikely to affect the ability of people with these types of disabilities to engage in interactions. Still, the public entity must always demonstrate that this element is met with respect to the specific facts of the nonconformance at issue.

Third, pursuant to § 35.205(c), individuals with disabilities must be able to conduct the same transactions as individuals without disabilities. This means that people with disabilities can complete all of the same transactions on the web content or mobile app that people without disabilities can. For example, § 35.205(c) would not be satisfied if people with disabilities could not submit a form or process their payment. However, § 35.205(c) would likely be satisfied if web content does not conform to Success Criterion 4.1.1 about parsing. This Success Criterion requires that information is coded properly so that technology like browsers and screen readers can accurately interpret the content and, for instance, deliver that content to a user correctly so that they can complete a transaction, or avoid crashing in the middle of the transaction.<sup>[221]</sup> However, according to W3C, this Success Criterion is no longer needed to ensure accessibility because of improvements in browsers and assistive technology.<sup>[222]</sup> Thus, although conformance to this Success Criterion is required by WCAG 2.1 Level AA, a failure to conform to this Success Criterion is unlikely to affect the ability of people with disabilities to conduct transactions. However, the entity must always demonstrate that this element is met with respect to the specific facts of the nonconformance at issue.

Fourth, § 35.205(d) requires that individuals with disabilities must be able to otherwise participate in or benefit from the same services, programs, and activities as individuals without disabilities. Section 35.205(d) is intended to address anything else within the scope of title II (*i.e.*, any service, program, or activity that cannot fairly be characterized as accessing information, engaging in an interaction, or conducting a transaction) for which someone who does not have a disability could use the public entity's web content or mobile app. Section 35.205(d) should be construed broadly to ensure that the ability of individuals with disabilities to use any part of the public entity's web content or mobile app that individuals without disabilities are able to use is not affected by nonconformance to the technical standard.

## Explanation of Changes From Language Discussed in the NPRM

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<sup>[220]</sup> See W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 2.2.1 Timing Adjustable* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#timing-adjustable> [<https://perma.cc/V3XZ-KJDG>].

<sup>[222]</sup> W3C, *WCAG 2 FAQ, How and why is success criteria 4.1.1 Parsing obsolete?*, <https://www.w3.org/WAI/standards-guidelines/wcag/faq/#parsing411> [<https://perma.cc/7Q9H-JVSZ>] (Oct. 5, 2023).

<sup>[221]</sup> W3C, *Understanding SC 4.1.1: Parsing (Level A)*, <https://www.w3.org/WAI/WCAG21/Understanding/parsing.html> [<https://perma.cc/5Z8Q-GW5E>] (June 20, 2023).

The regulatory language codified in § 35.205 is very similar to language discussed in the NPRM's preamble.<sup>[223]</sup> However, the Department believes it is helpful to explain differences between that discussion in the NPRM and the final rule. The Department has only made three substantive changes to the NPRM's relevant language.

First, though the NPRM discussed excusing noncompliance that "does not prevent" equal access, § 35.205 excuses noncompliance that "would not affect" such access. The Department was concerned that the use of "does not" could have been incorrectly read to require a showing that a specific individual did not have substantially equivalent access to the web content or mobile app. In changing the language to "would not," the Department clarifies that the threshold requirements for bringing a challenge to compliance under subpart H of this part are the same as under any other provision of the ADA. Except as otherwise required by existing law, a rebuttal of a public entity's invocation of this provision would not need to show that a specific individual did not have substantially equivalent access to the web content or mobile app. Rather, the issue would be whether the nonconformance is the type of barrier that would affect the ability of individuals with pertinent disabilities to access the web content or mobile app in a substantially equivalent manner. The same principles would apply to informal dispute resolution or agency investigations resolved outside of court, for example. Certainly, the revised standard would encompass a barrier that actually does affect a specific individual's access, so this revision does not narrow the provision.

Second, the Department originally proposed considering whether nonconformance "prevent[s] a person with a disability" from using the web content or mobile app, but § 35.205 instead considers whether nonconformance would "affect the ability of individuals with disabilities" to use the web content or mobile app. This revision is intended to clarify what a public entity seeking to invoke this provision needs to demonstrate. The Department explained in the NPRM that the purpose of this approach was to provide equal access to people with disabilities, and limit violations to those that affect access.<sup>[224]</sup> But even when not entirely prevented from using web content or mobile app, an individual with disabilities can still be denied equal access by impediments falling short of that standard. The language now used in this provision more accurately reflects this reality and achieves the objective proposed in the NPRM. As explained earlier in the discussion of § 35.205, under the language in this provision, it would not be sufficient for a public entity to show that nonconformance would not completely block people with disabilities from using the public entity's web content or a mobile app as described in § 35.205(a) through (d). In other words, someone would not need to be entirely prevented from using the web content or mobile app before an entity could be considered out of compliance. Instead, the effect of the nonconformance must be considered. This does not mean that any effect on usability, however slight, is sufficient to prove a violation. Only nonconformance that would affect the ability of individuals with disabilities to do the activities in § 35.205(a) through (d) in a way that provides substantially equivalent timeliness, privacy, independence, and ease of use would prevent a public entity from relying on this provision.

Third, the language proposed in the NPRM considered whether a person with a disability would have substantially equivalent "ease of use." The Department believed that timeliness, privacy, and independence were all components that affected whether ease of use was substantially equivalent. Because several commenters proposed explicitly specifying these factors in addition to "ease of use," the Department is persuaded that these factors warrant

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<sup>[223]</sup> 88 FR 51983.

<sup>[224]</sup> *Id.*

separate inclusion and emphasis as aspects of user experience that must be substantially equivalent. This specificity ensures clarity for public entities, individuals with disabilities, Federal agencies, and courts about how to analyze an entity's invocation of this provision.

Therefore, the Department has added additional language to clarify that timeliness, privacy, and independence are all important concepts to consider when evaluating whether this provision applies. If a person with a disability would need to take significantly more time to successfully navigate web content or a mobile app that does not conform to the technical standard because of the content or app's nonconformance, that person is not being provided with a substantially equivalent experience to that of people without disabilities. Requiring a person with a disability to spend substantially more time to do something is placing an additional burden on them that is not imposed on others. Privacy and independence are also crucial components that can affect whether a person with a disability would be prevented from having a substantially equivalent experience. Adding this language to § 35.205 ensures consistency with the effective communication provision of the ADA.<sup>[225]</sup> The Department has included timeliness, privacy, and independence in this provision for clarity and to avoid unintentionally narrowing what should be a fact-intensive analysis. However, "ease of use" may also encompass other aspects of a user's experience that are not expressly specified in the regulatory text, such as safety risks incurred by people with disabilities as a result of nonconformance.<sup>[226]</sup> This language should be construed broadly to allow for consideration of other ways in which nonconformance would make the experience of users with disabilities more difficult or burdensome than the experience of users without disabilities in specific scenarios.

## Justification for This Provision

After carefully considering the various public comments received, the Department believes that a tailored approach is needed for measuring compliance with a technical standard in the digital space. The Department also believes that the compliance framework adopted in § 35.205 is preferable to any available alternatives because it strikes the most appropriate balance between equal access for individuals with disabilities and feasibility for public entities.

## The Need To Tailor a Compliance Approach for the Digital Space

Most of the commenters who addressed the question of what approach subpart H of this part should take to assessing compliance provided information that supported the Department's decision to tailor an approach for measuring compliance that is specific to the digital space (*i.e.*, an approach that differs from the approach that the Department has taken for physical access). Only a few commenters believed that the Department should require 100 percent conformance to WCAG 2.1 Level AA, as is generally required for newly constructed facilities.<sup>[227]</sup> Commenters generally discussed two reasons why a different approach was appropriate: differences between the physical and digital space and increased litigation risk.

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<sup>[226]</sup> See, e.g., W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 2.3.1. Three Flashes or Below Threshold* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#three-flashes-or-below-threshold> [<https://perma.cc/A7P9-WCQY>] (addressing aspects of content design that could trigger seizures or other physical reactions).

<sup>[225]</sup> Section 35.160(b)(2).

First, many commenters, including commenters from State and local government entities and trade groups representing public accommodations, emphasized how the built environment differs from the digital environment. These commenters agreed with the Department's suggestion in the NPRM that the dynamic and interconnected nature of web content and mobile apps could present unique challenges for compliance.<sup>[228]</sup>

Digital content changes much more frequently than buildings do. Every modification to web content or a mobile app could lead to some risk of falling out of perfect conformance to WCAG 2.1 Level AA. Public entities will need to address this risk much more frequently under subpart H of this part than they do under the ADA's physical access requirements, because web content and mobile apps are updated much more often than buildings are. By their very nature, web content and mobile apps can easily be updated often, while most buildings are designed to last for years, if not decades, without extensive updates.

As such, State and local government entities trying to comply with their obligations under subpart H of this part will need to evaluate their compliance more frequently than they evaluate the accessibility of their buildings. But regular consideration of how any change that they make to their web content or mobile app will affect conformance to WCAG 2.1 Level AA and the resulting iterative updates may still allow minor nonconformances to escape notice. Given these realities attending web content and mobile apps, the Department believes that it is likely to be more difficult for State and local government entities to maintain perfect conformance to the technical standard set forth in subpart H than it is to comply with the ADA Standards. Commenters agreed that maintaining perfect conformance to the technical standard would be difficult.

Web content and content in mobile apps are also more likely to be interconnected, such that updates to some content may affect the conformance of other content in unexpected ways, including in ways that may lead to technical nonconformance without affecting the user experience for individuals with disabilities. Thus, to maintain perfect conformance, it would not necessarily be sufficient for public entities to confirm the conformance of their new content; they would also need to ensure that any updates do not affect the conformance of existing content. The same kind of challenge is unlikely to occur in physical spaces.

Second, many commenters raised concerns about the litigation risk that requiring perfect conformance to WCAG 2.1 Level AA would pose. Commenters feared being subjected to a flood of legal claims based on any failure to conform to the technical standard, however minor, and regardless of the impact—or lack thereof—the nonconformance has on accessibility. Commenters agreed with the Department's suggestion that due to the dynamic, complex, and interconnected nature of web content and mobile apps, a public entity's web content and mobile apps may be more likely to be out of conformance to WCAG 2.1 Level AA than its buildings are to be out of compliance with the ADA Standards, leading to increased legal risk. Some commenters even stated that 100 percent conformance to WCAG 2.1 Level AA would be unattainable or impossible to maintain. Commenters also agreed with the Department's understanding that the prevalence of automated web accessibility testing could enable any individual to find evidence of nonconformance to WCAG 2.1 Level AA even where that individual has not experienced any impact on access and the nonconformance would not affect others' access, with the result that identifying instances of merely technical nonconformance to WCAG 2.1 Level AA is likely much easier than identifying merely technical noncompliance with the ADA Standards.

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[227] Section 35.151(a) and (c).

[228] 88 FR 51981.

Based on the comments it received, the Department believes that if it does not implement a tailored approach to compliance under subpart H of this part, the burden of litigation under subpart H could become particularly challenging for public entities, enforcement agencies, and the courts. Though many comments about litigation risk came from public entities, commenters from some disability advocacy organizations agreed that subpart H should not encourage litigation about issues that do not affect a person with a disability's ability to equally use and benefit from a website or mobile app, and that liability should be limited. After considering the information commenters provided, the Department is persuaded that measuring compliance as strictly 100 percent conformance to WCAG 2.1 Level AA would not be the most prudent approach, and that an entity's compliance obligations can be limited under some narrow circumstances without undermining the objective of ensuring equal access to web content and mobile apps in subpart H.

## Reasons for Adopting This Compliance Approach

The Department has carefully considered many different approaches to defining when a State or local government entity has met its obligations under subpart H of this part. Of all the approaches considered—including those discussed in the NPRM as well as those proposed by commenters—the Department believes the compliance approach set forth in § 35.205 strikes the most appropriate balance between providing equal access for people with disabilities and ensuring feasibility for public entities, courts, and Federal agencies. The Department believes that the approach set forth in subpart H is preferable to all other approaches because it emphasizes actual access, is consistent with existing legal frameworks, and was supported by a wide range of commenters.

Primarily, the Department has selected this approach because it appropriately focuses on the experience of individuals with disabilities who are trying to use public entities' web content or mobile apps. By looking at the effect of any nonconformance to the technical standard, this approach will most successfully implement the ADA's goals of "equality of opportunity" and "full participation."<sup>[229]</sup> It will also be consistent with public entities' existing regulatory obligations to provide individuals with disabilities with an equal opportunity to participate in and benefit from their services, obtain the same result, and gain the same benefit.<sup>[230]</sup> This approach ensures that nonconformance to the technical standard can be addressed when it affects these core promises of equal access.

The Department heard strong support from the public for ensuring that people with disabilities have equal access to the same services, programs, and activities as people without disabilities, with equivalent timeliness, privacy, independence, and ease of use. Similarly, many commenters from disability advocacy organizations stated that the goal of subpart H of this part should be to provide access to people with disabilities that is functionally equivalent to the access experienced by people without disabilities. Other disability advocates stressed that technical compliance should not be prioritized over effective communication. Section 35.205 will help to achieve these goals.

The Department believes that this approach will not have a detrimental impact on the experience of people with disabilities who are trying to use web content or mobile apps. By its own terms, § 35.205 would require a public entity to demonstrate that any nonconformance would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use. As discussed earlier in the analysis of § 35.205, it is likely that this will be a high hurdle to clear. If nonconformance to the technical standard would affect people with disabilities' ability to use the

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<sup>[230]</sup> See § 35.130(b)(1)(ii) and (iii).

<sup>[229]</sup> 42 U.S.C. 12101(a)(7).

web content or mobile app in this manner, this provision will not apply, and a public entity will not have met its obligations under subpart H of this part. As noted earlier in this discussion, full conformance to WCAG 2.1 Level AA is the only definitive way for a public entity to avoid reliance on § 35.205.

This provision would nonetheless provide public entities who have failed to conform to WCAG 2.1 Level AA with a way to avoid the prospect of liability for an error that is purely technical in nature and would not affect accessibility in practice. This will help to curtail the specter of potential liability for every minor technical error, no matter how insignificant. However, § 35.205 is intended to apply in rare circumstances and will require a detailed analysis of the specific facts surrounding the impact of each alleged instance of nonconformance. As noted earlier, the Department does not expect or intend that § 35.205 will excuse most nonconformance to the technical standard.

The Department also believes this approach is preferable to the other approaches considered because it is likely to be familiar to people with disabilities and public entities, and this general consistency with title II's regulatory framework (notwithstanding some necessary differences from the physical context as noted earlier in this discussion) has important benefits. The existing regulatory framework similarly requires public entities to provide equal opportunity to participate in or benefit from services, programs, or activities;<sup>[231]</sup> equal opportunity to obtain the same result;<sup>[232]</sup> full and equal enjoyment of services, programs, and activities;<sup>[233]</sup> and communications with people with disabilities that are as effective as communications with others, which includes consideration of timeliness, privacy, and independence.<sup>[234]</sup> The 1991 and 2010 ADA Standards also allow designs or technologies that result in substantially equivalent accessibility and usability.<sup>[235]</sup> Because of the consistency between § 35.205 and existing law, the Department does not anticipate that the requirements for bringing challenges to compliance with subpart H of this part will be radically different than the framework that currently exists. Subpart H adds certainty by establishing that conformance to WCAG 2.1 Level AA is generally sufficient for a public entity to meet its obligations to ensure accessibility of web content and mobile apps. However, in the absence of perfect conformance to WCAG 2.1 Level AA, the compliance approach established by § 35.205 keeps the focus on equal access, as it is under current law. Section 35.205 provides a limited degree of flexibility to public entities without displacing this part's guarantee of equal access for individuals with disabilities or upsetting the existing legal framework.

Finally, this approach to compliance is preferable to the other approaches the Department considered because there was a notable consensus among public commenters supporting it. A wide range of commenters, including disability advocacy organizations, trade groups representing public accommodations, accessibility experts, and State and local government entities submitted supportive comments. Even some of the commenters who opposed this approach noted that it would be helpful if it was combined with a clear technical standard, which the Department has done. Commenters representing a broad spectrum of interests seem to agree with this approach, with several commenters proposing very similar regulatory language. After considering the relative consensus among commenters, together with the other factors discussed herein, the Department has decided to adopt the approach to defining compliance that is set forth in § 35.205.

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<sup>[235]</sup> 28 CFR part 36, appendix D, at 1000 (2022) (1991 ADA Standards); 36 CFR part 1191, appendix B, at 329 (2022) (2010 ADA Standards).

<sup>[234]</sup> *Id.* § 35.160(a)(1) and (b).

<sup>[233]</sup> *Id.* § 35.130(b)(8).

<sup>[232]</sup> *Id.* § 35.130(b)(1)(iii).

<sup>[231]</sup> *Id.* §§ 35.130(b)(1)(ii) and 35.160(b)(1).

## Alternative Approaches Considered

In addition to the approach set forth in § 35.205, the Department also considered compliance approaches that would have allowed isolated or temporary interruptions to conformance; required a numerical percentage of conformance to the technical standard; or allowed public entities to demonstrate compliance either by establishing and following certain specified accessibility policies and practices or by showing organizational maturity (*i.e.*, that the entity has a sufficiently robust accessibility program to consistently produce accessible web content and mobile apps). The Department also considered the approaches that other States, Federal agencies, and countries have taken, and other approaches suggested by commenters. After carefully weighing all of these alternatives, the Department believes the compliance approach adopted in § 35.205 is the most appropriate framework for determining whether a State or local government entity has met its obligations under § 35.200.

### Isolated or Temporary Interruptions

As the Department noted in the NPRM,<sup>[236]</sup> the current title II regulation does not prohibit isolated or temporary interruptions in service or access to facilities due to maintenance or repairs.<sup>[237]</sup> In response to the Department's question about whether it should add a similar provision in subpart H of this part, commenters generally supported including an analogous provision in subpart H. They noted that some technical difficulties are inevitable, especially when updating web content or mobile apps. Some commenters elaborated that noncompliance with the technical standard should be excused if it is an isolated incident, as in one page out of many; temporary, as in an issue with an update that is promptly fixed; or through other approaches to measuring compliance addressed in this section. A few commenters stated that due to the continuously evolving nature of web content and mobile apps, there is even more need to include a provision regarding isolated or temporary interruptions than there is in the physical space. Another commenter suggested that entities should prioritize emergency-related information by making sure they have alternative methods of communication in place in anticipation of isolated or temporary interruptions that prevent access to this content.

The Department has considered all of the comments it received on this issue and, based on those comments and its own independent assessment, decided not to separately excuse an entity's isolated or temporary noncompliance with § 35.200(b) due to maintenance or repairs in subpart H of this part. Rather, as stated in § 35.205, an entity's legal responsibility for an isolated or temporary instance of nonconformance to WCAG 2.1 Level AA will depend on whether the isolated or temporary instance of nonconformance—as with any other nonconformance—would affect the ability of individuals with disabilities to use the public entity's web content or mobile app in a substantially equivalent way.

The Department believes it is likely that the approach set forth in § 35.205 reduces the need for a provision that would explicitly allow for instances of isolated or temporary noncompliance due to maintenance or repairs, while simultaneously limiting the negative impact of such a provision on individuals with disabilities. The Department believes this is true for two reasons.

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<sup>[237]</sup> See § 35.133(b).

<sup>[236]</sup> 88 FR 51981.

First, to the extent isolated or temporary noncompliance due to maintenance or repairs occur that affect web content or mobile apps, it logically follows from the requirements in subpart H of this part that these interruptions should generally result in the same impact on individuals with and without disabilities after the compliance date because, in most cases, all users would be relying on the same content, and so interruptions to that content would impact all users. From the compliance date onward, accessible web content and mobile apps and the web content and mobile apps used by people without disabilities should be one and the same (with the rare exception of conforming alternate versions provided for in § 35.202). Therefore, the Department expects that isolated or temporary noncompliance due to maintenance or repairs generally will affect the ability of people with disabilities to use web content or mobile apps to the same extent it will affect the experience of people without disabilities. For example, if a website is undergoing overnight maintenance and so an online form is temporarily unavailable, the form would already conform to WCAG 2.1 Level AA, and so there would be no separate feature or form for individuals with disabilities that would be affected while a form for people without disabilities is functioning. In such a scenario, individuals with and without disabilities would both be unable to access web content, such that there would be no violation of subpart H of this part.

Thus, the Department believes that a specific provision regarding isolated or temporary noncompliance due to maintenance or repairs is less necessary than it is for physical access. When there is maintenance to a feature that provides physical access, such as a broken elevator, access for people with disabilities is particularly impacted. In contrast, when there is maintenance to web content or mobile apps, people with and without disabilities will generally both be denied access, such that no one is denied access on the basis of disability.

Second, even to the extent isolated or temporary noncompliance due to maintenance or repairs affects only an accessibility feature, that noncompliance may fit the parameters laid out in § 35.205 such that an entity will be deemed to have complied with its obligations under § 35.200. Section 35.205 does not provide a blanket limitation that would excuse all isolated or temporary noncompliance due to maintenance or repairs, however. The provision's applicability would depend on the particular circumstances of the interruption and its impact on people with disabilities. It is possible that an interruption that only affects an accessibility feature will not satisfy the elements of § 35.205 and an entity will not be deemed in compliance with § 35.200. Even one temporary or isolated instance of nonconformance could affect the ability of individuals with disabilities to use the web content with substantially equivalent ease of use, depending on the circumstances. As discussed in this section, this will necessarily be a fact-specific analysis.

In addition to being less necessary than in the physical access context, the Department also believes a specific provision regarding isolated or temporary interruptions due to maintenance or repairs would have more detrimental incentives in the digital space by discouraging public entities from adopting practices that would reduce or avert the disruptions caused by maintenance and repair that affect accessibility. Isolated or temporary noncompliance due to maintenance or repairs of features that provide physical access would be necessary regardless of what practices public entities put in place,<sup>[238]</sup> and the repairs and maintenance to those features often cannot be done without interrupting access specifically for individuals with disabilities. For example, curb ramps will need to be repaved and elevators will need to be repaired because physical materials break down. In contrast, the Department believes that, despite the dynamic nature of web content and mobile apps, incorporating accessible design principles and best practices will generally enable public entities to anticipate and avoid many instances of isolated or temporary noncompliance due to maintenance or repairs—including many isolated or temporary instances of noncompliance that would have such a significant impact that they would affect people with disabilities' ability to use web content or mobile apps in a substantially equivalent way. Some of these best practices, such as regular accessibility testing and remediation, would likely be needed for public entities to comply with subpart H of this part regardless of whether the Department incorporated a provision regarding isolated or temporary interruptions. And practices like testing content before it is made available will frequently allow maintenance and repairs that affect accessibility to

occur without interrupting access, in a way that is often impossible in physical spaces. The Department declines to adopt a limitation for isolated or temporary interruptions due to maintenance or repairs. Such a limitation may disincentivize public entities from implementing processes that could prevent many interruptions from affecting substantially equivalent access.

## Numerical Approach

The Department considered requiring a certain numerical percentage of conformance to the technical standard. This percentage could be a simple numerical calculation based on the number of instances of nonconformance across the public entity's web content or mobile app, or the percentage could be calculated by weighting different instances of nonconformance differently. Weighted percentages of many different types, including giving greater weight to more important content, more frequently accessed content, or more severe access barriers, were considered.

When discussing a numerical approach in the NPRM, the Department noted that the approach seemed unlikely to ensure access.<sup>[239]</sup> Even if only a very small percentage of content does not conform to the technical standard, that could still block an individual with a disability from accessing a service, program, or activity. For example, even if there was only one instance of nonconformance, that single error could prevent an individual with a disability from submitting an application for public benefits. Commenters agreed with this concern. As such, the Department continues to believe that a percentage-based approach would not be sufficient to advance the objective of subpart H of this part to ensure equal access to State and local government entities' web content and mobile apps. Commenters also agreed with the Department that a percentage-based standard would be difficult to implement because percentages would be challenging to calculate.

Based on the public comments it received about this framework, which overwhelmingly agreed with the concerns the Department raised in the NPRM, the Department continues to believe that adopting a percentage-based approach is not feasible. The Department received a very small number of comments advocating for this approach, which were all from State and local government entities. Even fewer commenters suggested a framework for implementing this approach (*i.e.*, the percentage of conformance that should be adopted or how that percentage should be calculated). Based on the very limited information provided in support of a percentage-based approach submitted from commenters, as well as the Department's independent assessment, it would be challenging for the Department to articulate a sufficient rationale for choosing a particular percentage of conformance or creating a specific conformance formula. Nothing submitted in public comments meaningfully changed the Department's previous concerns about calculating a percentage or specifying a formula. For all of the reasons discussed, the Department declines to adopt this approach.

## Policy-Based Approach

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<sup>[238]</sup> See 28 CFR part 35, appendix B, at 705 (2022) (providing that it is impossible to guarantee that mechanical devices will never fail to operate).

<sup>[239]</sup> 88 FR 51982-51983.

The Department also considered allowing a public entity to demonstrate compliance with subpart H of this part by affirmatively establishing and following certain robust policies and practices for accessibility feedback, testing, and remediation. Under this approach, the Department would have specified that nonconformance to WCAG 2.1 Level AA does not constitute noncompliance with subpart H if a public entity has established certain policies for testing the accessibility of its web content and mobile apps and remediating inaccessible content, and the entity can demonstrate that it follows those policies. Potential policies could also address accessibility training.

As the Department stated in the NPRM, there were many ways to define the specific policies that would have been deemed sufficient under this approach.<sup>[240]</sup> Though many commenters supported the idea of a policy-based approach, they suggested a plethora of policies that should be required by subpart H of this part. Commenters disagreed about what type of testing should be required (*i.e.*, automated, manual, or both), who should conduct testing, how frequently testing should be conducted, and how promptly any nonconformance should be remediated. As just one example of the broad spectrum of policies proposed, the frequency of accessibility testing commenters suggested ranged from every 30 days to every five years. A few commenters suggested that no time frames for testing or remediation should be specified in subpart H; rather, they proposed that the nature of sufficient policies should depend on the covered entity's resources, the characteristics of the content, and the complexity of remediating the nonconformance. Commenters similarly disagreed about whether, when, and what kind of training should be required. Commenters also suggested requiring many additional policies and practices, including mechanisms for providing accessibility feedback; accessibility statements; third-party audits; certifications of conformance; documentation of contracting and procurement practices; adopting specific procurement practices; setting certain budgets or staffing requirements; developing statewide panels of accessibility experts; and making accessibility policies, feedback, reports, or scorecards publicly available.

The Department declines to adopt a policy-based approach because, based on the wide range of policies and practices proposed by commenters, there is not a sufficient rationale that would justify adopting any specific set of accessibility policies in the generally applicable regulation in subpart H of this part. Many of the policies commenters suggested would require the Department to dictate particular details of all public entities' day-to-day operations in a way the Department does not believe is appropriate or sufficiently justified to do in subpart H. There was no consensus among commenters about what policies would be sufficient, and most commenters did not articulate a specific basis supporting why their preferred policies were more appropriate than any other policies. In the absence of more specific rationales or a clearer consensus among commenters or experts in the field about what policies would be sufficient, the Department does not believe it is appropriate to prescribe what specific accessibility testing and remediation policies all State and local government entities must adopt to comply with their obligations under subpart H. Based on the information available to the Department at this time, the Department's adoption of any such specific policies would be unsupported by sufficient evidence that these policies will ensure accessibility, which could cause significant harm. It would allow public entities to comply with their legal obligations under subpart H based on policies alone, even though those policies may fail to provide equal access to online services, programs, or activities.

The Department also declines to adopt a policy-based approach that would rely on the type of general, flexible policies supported by some commenters, in which the sufficiency of public entities' policies would vary depending on the factual circumstances. The Department does not believe that such an approach would give individuals with disabilities sufficient certainty about what policies and access they could expect. Such an approach would also fail

<sup>[240]</sup> *Id.* at 51983-51984.

to give public entities sufficient certainty about how they should meet their legal obligations under subpart H of this part. If it adopted a flexible approach suggested by commenters, the Department might not advance the current state of the law, because every public entity could choose any accessibility testing and remediation policies it believed would be sufficient to meet its general obligations, without conforming to the technical standard or ensuring access. The Department has heard State and local government entities' desire for increased clarity about their legal obligations, and adopting a flexible standard would not address that need.

## Organizational Maturity

Another compliance approach that the Department considered would have allowed an entity to demonstrate compliance with subpart H of this part by showing organizational maturity (*i.e.*, that the organization has a sufficiently robust program for web and mobile app accessibility). As the Department explained in the NPRM, while accessibility conformance testing evaluates the accessibility of a particular website or mobile app at a specific point in time, organizational maturity evaluates whether an entity has developed the infrastructure needed to produce accessible web content and mobile apps consistently.<sup>[241]</sup>

Commenters, including disability advocacy organizations, State and local government entities, trade groups representing public accommodations, and accessibility experts were largely opposed to using an organizational maturity approach to evaluate compliance. Notably, one of the companies that developed an organizational maturity model the Department discussed in the NPRM did not believe that an organizational maturity model was an appropriate way to assess compliance. Other commenters who stated that they supported the organizational maturity approach also seemed to be endorsing organizational maturity as a best practice rather than a legal framework, expressing that it was not an appropriate substitute for conformance to a technical standard.

Misunderstandings about what an organizational maturity framework is and how the Department was proposing to use it that were evident in several comments also demonstrated that the organizational maturity approach raised in the NPRM was not sufficiently clear to the public. For example, at least one commenter conflated organizational maturity with the approach the Department considered that would assess an organization's policies. Another commenter seemed to understand the Department's consideration of organizational maturity as only recommending a best practice, even though the Department was considering it as legal requirement. Comments like these indicate that the organizational maturity approach the Department considered to measure compliance would be confusing to the public if adopted.

Among commenters that supported the organizational maturity approach, there was no consensus about how organizational maturity should be defined or assessed, or what level of organizational maturity should be sufficient to demonstrate compliance with subpart H of this part. There are many ways to measure organizational maturity, and it is not clear to the Department that one organizational maturity model is more appropriate or more effective than any other. The Department therefore declines to adopt an organizational maturity approach in subpart H because any organizational maturity model for compliance with web accessibility that the Department could develop or incorporate would not have sufficient justification based on the facts available to the Department at this

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<sup>[241]</sup> *Id.* at 51984; see also W3C, Accessibility Maturity Model: Group Draft Note, § 1.1: About the Accessibility Maturity Model (Dec. 15, 2023), <https://www.w3.org/TR/maturity-model/> [<https://perma.cc/UX4X-J4MF>].

time. As with the policy-based approach discussed previously in this appendix, if the Department were to allow public entities to define their own organizational maturity approach instead of adopting one specific model, this would not provide sufficient predictability or certainty for people with disabilities or public entities.

The Department also declines to adopt this approach because commenters did not provide—and the Department is not aware of—information or data to suggest that increased organizational maturity reliably resulted in increased conformance to WCAG 2.1 Level AA. Like the policy-based approach discussed previously in this appendix, if the Department were to adopt an organizational maturity approach that was not sufficiently rigorous, public entities would be able to comply with subpart H of this part without providing equal access. This would undermine the purpose of the part.

## Other Federal, International, and State Approaches

The Department also considered approaches to measuring compliance that have been used by other agencies, other countries or international organizations, and States, as discussed in the NPRM.<sup>[242]</sup> As to other Federal agencies' approaches, the Department has decided not to adopt the Access Board's standards for section 508 compliance for the reasons discussed in § 35.200 of the section-by-section analysis regarding the technical standard. The Section 508 Standards require full conformance to WCAG 2.0 Level AA,<sup>[243]</sup> but the Department has determined that requiring perfect conformance to the technical standard set forth in subpart H of this part would not be appropriate for the reasons discussed elsewhere in this appendix. Perfect conformance is less appropriate in subpart H than under section 508 given the wide variety of public entities covered by title II of the ADA, many of which have varying levels of resources, compared to the relatively limited number of Federal agencies that must follow section 508. For the reasons stated in the section-by-section analysis of § 35.200 regarding compliance time frame alternatives, the Department also declines to adopt the tiered approach that the Department of Transportation took in its regulation on accessibility of air carrier websites, which required certain types of content to be remediated more quickly.<sup>[244]</sup>

The Department has also determined that none of the international approaches to evaluating compliance with web accessibility laws that were discussed in the NPRM are currently feasible to adopt in the United States.<sup>[245]</sup> The methodologies used by the European Union and Canada require reporting to government agencies. This would pose counterproductive logistical and administrative difficulties for regulated entities and the Department. The Department believes that the resources public entities would need to spend on data collection and reporting would detract from efforts to increase the accessibility of web content and mobile apps. Furthermore, reporting to Federal agencies is not required under other subparts of the ADA, and it is not clear to the Department why such reporting would be more appropriate under subpart H of this part than under others. New Zealand's approach, which requires testing and remediation, is similar to the policy-based approach already discussed in this section, and the Department declines to adopt that approach for the reasons stated in that discussion. The approach taken in the United Kingdom, where a government agency audits websites and mobile apps, sends a report to the public entity, and requires the entity to fix accessibility issues, is similar to one method the Department currently uses to enforce title II of the ADA, including title II web and mobile app accessibility.<sup>[246]</sup> Though the Department will continue to

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<sup>[244]</sup> See 14 CFR 382.43.

<sup>[243]</sup> 36 CFR 1194.1; *id.* at part 1194, appendix A, section E205.4.

<sup>[242]</sup> 88 FR 51980-51981.

investigate complaints and enforce the ADA, given constraints on its resources and the large number of entities within its purview to investigate, the Department is unable to guarantee that it will conduct a specific amount of enforcement under subpart H of this part on a particular schedule.

The Department has considered many States' approaches to assessing compliance with their web accessibility laws<sup>[247]</sup> and declines to adopt these laws at the Federal level. State laws like those in Florida, Illinois, and Massachusetts, which do not specify how compliance will be measured or how entities can demonstrate compliance, are essentially requiring 100 percent compliance with a technical standard. This approach is not feasible for the reasons discussed earlier in this section. In addition, this approach is not feasible because of the large number and wide variety of public entities covered by the ADA, as compared with the relatively limited number of State agencies in a given State. Laws like California's, which require entities covered by California's law to certify or post evidence of compliance, would impose administrative burdens on public entities similar to those imposed by the international approaches discussed in the preceding paragraph. Some State agencies, including in California, Minnesota, and Texas, have developed assessment checklists, trainings, testing tools, and other resources. The Department will issue a small entity compliance guide,<sup>[248]</sup> which should help public entities better understand their obligations. As discussed elsewhere in this appendix, the Department may also provide further guidance about best practices for a public entity to meet its obligations under subpart H of this part. However, such resources are not substitutes for clear and achievable regulatory requirements. Some commenters stated that regulations should not be combined with best practices or guidance, and further stated that testing methodologies are more appropriate for guidance. The Department agrees and believes State and local government entities are best suited to determine how they will comply with the technical standard, depending on their needs and resources.

The Department also declines to adopt a model like the one used in Texas, which requires State agencies to, among other steps, conduct tests with one or more accessibility validation tools, establish an accessibility policy that includes criteria for compliance monitoring and a plan for remediation of noncompliant items, and establish goals and progress measurements for accessibility.<sup>[249]</sup> This approach is one way States and other public entities may choose to ensure that they comply with subpart H of this part. However, as noted in the discussion of the policy-based approach, the Department is unable to calibrate requirements that provide sufficient predictability and certainty for every public entity while maintaining sufficient flexibility. The Department declines to adopt an approach like Texas's for the same reasons it declined to adopt a policy-based approach.

Commenters suggested a few additional State and international approaches to compliance that were not discussed in the NPRM. Though the Department reviewed and considered each of these approaches, it finds that they are not appropriate to adopt in subpart H of this part. First, Washington's accessibility policy<sup>[250]</sup> and associated standard<sup>[251]</sup> require agencies to develop policies and processes to ensure compliance with the technical standard,

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<sup>[246]</sup> See § 35.172(b) and (c) (describing the process for compliance reviews). As noted, however, the Department is unable to guarantee that it will conduct a specific amount of enforcement under subpart H of this part on a particular schedule.

<sup>[245]</sup> 88 FR 51980.

<sup>[248]</sup> See Public Law 104-121, sec. 212, 110 Stat. at 858.

<sup>[247]</sup> 88 FR 51980-51981.

<sup>[249]</sup> 1 Tex. Admin. Code secs. 206.50, 213.21 (West 2023).

including implementing and maintaining accessibility plans. As with Texas's law and a more general policy-based approach, which are both discussed elsewhere in this appendix, Washington's approach would not provide sufficient specificity and certainty to ensure conformance to a technical standard in the context of the title II regulatory framework that applies to a wide range of public entities; however, this is one approach to achieving conformance that entities could consider.

Additionally, one commenter suggested that the Department look to the Accessibility for Ontarians with Disabilities Act<sup>[252]</sup> and consider taking some of the steps to ensure compliance that the commenter states Ontario has taken. Specifically, the commenter suggested requiring training on how to create accessible content and creating an advisory council that makes suggestions on how to increase public education about the law's requirements. Though the Department will consider providing additional guidance to the public about how to comply with subpart H of this part, it declines to require State and local government entities to provide training to their employees. This would be part of a policy-based compliance approach, which the Department has decided not to adopt for the reasons discussed. However, the Department notes that public entities will likely find that some training is necessary and helpful to achieve compliance. The Department also declines to require State and local government entities to adopt accessibility advisory councils because, like training, this would be part of a policy-based compliance approach. However, public entities remain free to do so if they choose.

Finally, a coalition of State Attorneys General described how their States' agencies currently determine whether State websites and other technology are accessible, and suggested that the Department incorporate similar practices into its compliance framework. Some of these States have designated agencies that conduct automated testing, manual testing, or both, while others offer online tools or require agencies to conduct their own manual testing. Though some of these approaches come from States not already discussed, including Hawaii, New Jersey, and New York, the approaches commenters from these States discussed are similar to other approaches the Department has considered. These States have essentially adopted a policy-based approach. As noted elsewhere in this appendix, the Department believes that it is more appropriate for States and other regulated entities to develop their own policies to ensure compliance than it would be for the Department to establish one set of compliance policies for all public entities. Several State agencies conduct regular audits, but as noted previously in this appendix, the Department lacks the capacity to guarantee it will conduct a specific number of enforcement actions under subpart H of this part on a particular schedule. And as an agency whose primary responsibility is law enforcement, the Department is not currently equipped to develop and distribute accessibility testing software like some States have done. State and local government entities may wish to consider adopting practices similar to the ones commenters described even though subpart H does not require them to do so.

## Other Approaches Suggested by Commenters

[251] Wash. Tech. Sols., *Standard 188.10—Minimum Accessibility Standard*, [https://watech.wa.gov/sites/default/files/2023-09/188.10\\_Min\\_Std\\_2019\\_AS\\_Approved\\_03102020\\_1.docx](https://watech.wa.gov/sites/default/files/2023-09/188.10_Min_Std_2019_AS_Approved_03102020_1.docx). A Perma archive link was unavailable for this citation.

[250] Wash. Tech. Sols., *Policy 188—Accessibility*, [https://watech.wa.gov/sites/default/files/2023-09/188\\_Accessibility\\_2019\\_AS%2520v3%2520Approved.docx](https://watech.wa.gov/sites/default/files/2023-09/188_Accessibility_2019_AS%2520v3%2520Approved.docx). A Perma archive link was unavailable for this citation.

[252] *Accessibility for Ontarians With Disabilities Act, 2005*, S.O. 2005, c. 11 (Can.), <https://www.ontario.ca/laws/statute/05a11> [<https://perma.cc/V26B-2NSG>].

Commenters also suggested many other approaches the Department should take to assess and ensure compliance with subpart H of this part. The Department has considered all of the commenters' suggestions and declines to adopt them at this time.

First, commenters suggested that public entities should be permitted to provide what they called an "accommodation" or an "equally effective alternative method of access" when web content or mobile apps are not accessible. Under the approach these commenters envisioned, people with disabilities would need to pursue an interactive process where they discussed their access needs with the public entity and the public entity would determine how those needs would be met. The Department believes that adopting this approach would undermine a core premise of subpart H of this part, which is that web content and mobile apps will generally be accessible by default. That is, people with disabilities typically will not need to make a request to gain access to services, programs, or activities offered online, nor will they typically need to receive information in a different format. If the Department were to adopt the commenters' suggestion, the Department believes that subpart H would not address the gaps in accessibility highlighted in the need for the rulemaking discussed in section III.D.4 of the preamble to the final rule, as the current state of the law already requires public entities to provide reasonable modifications and effective communication to people with disabilities.<sup>[253]</sup> Under title II, individuals with disabilities cannot be, by reason of such disability, excluded from participation in or denied the benefits of the services, programs, or activities offered by State and local government entities, including those offered via the web and mobile apps.<sup>[254]</sup> One of the goals of the ADA also includes reducing segregation.<sup>[255]</sup> Accordingly, it is important for individuals with disabilities to have access to the same platforms as their neighbors and friends at the same time, and the commenters' proposal would not achieve that objective.

Second, commenters suggested a process, which is sometimes referred to as "notice and cure," by which a person with a disability who cannot access web content or a mobile app would need to notify the public entity that their web content or mobile app was not accessible and give the public entity a certain period of time to remediate the inaccessibility before the entity could be considered out of compliance with subpart H of this part. The Department is not adopting this framework for reasons similar to those discussed in relation to the "equally effective alternative" approach rejected in the previous paragraph. With subpart H, the Department is ensuring that people with disabilities generally will not have to request access to public entities' web content and content in mobile apps, nor will they typically need to wait to obtain that access. Given the Department's longstanding position on the accessibility of online content, discussed in section III.B and C of the preamble to the final rule, public entities should already be on notice of their obligations. If they are not, the final rule unquestionably puts them on notice.

Third, commenters suggested a flexible approach to compliance that would only require substantial compliance, good faith effort, reasonable efforts, or some similar concept that would allow the meaning of compliance to vary too widely depending on the circumstances, and without a clear connection to whether those efforts result in actual improvements to accessibility for people with disabilities. The Department declines to adopt this approach because it does not believe such an approach would provide sufficient certainty or predictability to State and local government entities or individuals with disabilities. Such an approach would undermine the benefits of adopting a technical standard.

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[255] 42 U.S.C. 12101(a)(2) and (5).

[254] 42 U.S.C. 12132.

[253] Section 35.130(b)(7) and 35.160.

The Department has already built a series of mechanisms into subpart H of this part that are designed to make it feasible for public entities to comply, including the delayed compliance dates in § 35.200(b), the exceptions in § 35.201, the conforming alternate version provision in § 35.202, the fundamental alteration or undue burdens limitations in § 35.204, and the compliance approach discussed here. In doing so, the Department has allowed for several departures from the technical standard, but only under clearly defined and uniform criteria, well-established principles in the ADA or WCAG, or circumstances that would not affect substantially equivalent access. Many of the approaches that commenters proposed are not similarly cabined. Those approaches would often allow public entities' mere attempts to achieve compliance to substitute for access. The Department declines to adopt more flexibility than it already has because it finds that doing so would come at too great a cost to accessibility and to the clarity of the obligations in subpart H.

Fourth, several commenters proposed a multi-factor or tiered approach to compliance. For example, one commenter suggested a three-tiered system where after one failed accessibility test the public entity would investigate the problem, after multiple instances of nonconformance they would enter into a voluntary compliance agreement with the Department, and if there were widespread inaccessibility, the Department would issue a finding of noncompliance and impose a deadline for remediation. Similarly, another commenter proposed that enforcement occur only when two of three criteria are met: errors are inherent to the content itself, errors are high impact or widely prevalent, and the entity shows no evidence of measurable institutional development regarding accessibility policy or practice within a designated time frame. The Department believes that these and other similar multi-factor approaches to compliance would be too complex for public entities to understand and for the Department to administer. It would also be extremely challenging for the Department to define the parameters for such an approach with an appropriate level of precision and a sufficiently well-reasoned justification.

Finally, many commenters proposed approaches to compliance that would expand the Department's role. Commenters suggested that the Department grant exceptions to the requirements in subpart H of this part on a case-by-case basis; specify escalating penalties; conduct accessibility audits, testing, or monitoring; provide grant funding; develop accessibility advisory councils; provide accessibility testing tools; specify acceptable accessibility testing software, resources, or methodologies; provide a list of accessibility contractors; and provide guidance, technical assistance, or training.

With the exception of guidance and continuing to conduct accessibility testing as part of compliance reviews or other enforcement activities, the Department is not currently in a position to take any of the actions commenters requested. As described in this section, the Department has limited enforcement resources. It is not able to review requests for exceptions on a case-by-case basis, nor is it able to conduct accessibility testing or monitoring outside of compliance reviews, settlement agreements, or consent decrees. Civil penalties for noncompliance with the ADA are set by statute and are not permitted under title II.<sup>[256]</sup> Though the Department sometimes seeks monetary relief for individuals aggrieved under title II in its enforcement actions, the appropriate amount of relief is determined on a case-by-case basis and would be challenging to establish in a generally applicable rule. The Department does not currently operate a grant program to assist public entities in complying with the ADA, and, based on the availability and allocation of the Department's current resources, it does not believe that administering advisory committees would be the best use of its resources. The Department also lacks the resources and technical expertise to develop and distribute accessibility testing software.

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<sup>[256]</sup> See 42 U.S.C. 12188(b)(2)(C) (allowing civil penalties under title III); see also 28 CFR 36.504(a)(3) (updating the civil penalty amounts).

The Department will issue a small entity compliance guide<sup>[257]</sup> and will continue to consider what additional guidance or training it can provide that will assist public entities in complying with their obligations. However, the Department believes that so long as public entities satisfy the requirements of subpart H of this part, it is appropriate to allow public entities flexibility to select accessibility tools and contractors that meet their individualized needs. Any specific list of tools or contractors that the Department could provide is unlikely to be helpful given the rapid pace at which software and contractor availability changes. Public entities may find it useful to consult other publicly available resources that can assist in selecting accessibility evaluation tools and experts.<sup>[258]</sup> Resources for training are also already available.<sup>[259]</sup> State and local government entities do not need to wait for the Department's guidance before consulting with technical experts and using resources that already exist.

## Public Comments on Other Issues in Response to the NPRM

The Department received comments on a variety of other issues in response to the NPRM. The Department responds to the remaining issues not already addressed in this section-by-section analysis.

### Scope

The Department received some comments that suggested that the Department should take actions outside the scope of the rulemaking to improve accessibility for people with disabilities. For example, the Department received comments suggesting that the rulemaking should: apply to all companies or entities covered under title III of the ADA; prohibit public entities from making information or communication available only via internet means; revise other portions of the title II regulation like subpart B of this part (general requirements); require accessibility of all documents behind any paywall regardless of whether title II applies; and address concerns about how the increased use of web and mobile app technologies may affect individuals with electromagnetic sensitivity. While the Department recognizes that these are important accessibility issues to people with disabilities across the country, they are outside of the scope of subpart H of this part, which focuses on web and mobile app accessibility under title II. Accordingly, these issues are not addressed in detail in subpart H.

The Department also received comments recommending that this part cover a broader range of technology in addition to web content and mobile apps, including technologies that may be developed in the future. The Department declines to broaden this part in this way. If, for example, the Department were to broaden the scope of the rulemaking to cover an open-ended range of technology, it would undermine one of the major goals of the rulemaking, which is to adopt a technical standard State and local government entities must adhere to and clearly specify which content must comply with that standard. In addition, the Department does not currently have sufficient information about how technology will develop in the future, and how WCAG 2.1 Level AA will (or will not) apply to that technology, to enable the Department to broaden the part to cover all future technological developments. Also, the Department has a long history of engaging with the public and stakeholders about web and

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<sup>[259]</sup> See, e.g., W3C, *Digital Accessibility Foundations Free Online Course*, <https://www.w3.org/WAI/courses/foundations-course/> [<https://perma.cc/KU9L-NU4H>] (Oct. 24, 2023).

<sup>[258]</sup> See, e.g., W3C, *Evaluating Web Accessibility Overview*, <https://www.w3.org/WAI/test-evaluate/> [<https://perma.cc/6RDS-X6AR>] (Aug. 1, 2023).

<sup>[257]</sup> See Public Law 104-121, sec. 212, 110 Stat. at 858.

mobile app accessibility and determined that it was appropriate to prioritize regulating in that area. However, State and local government entities have existing obligations under title II of the ADA with respect to services, programs, and activities offered through other types of technology.<sup>[260]</sup>

Another commenter suggested that the rulemaking should address operating systems. The commenter also suggested clarifying that public entities are required to ensure web content and mobile apps are accessible, usable, and interoperable with assistive technology. The Department understands this commenter to be requesting that the Department establish additional technical standards in this part beyond WCAG 2.1 Level AA, such as technical standards related to software. As discussed in this section and the section-by-section analysis of § 35.104, subpart H of this part focuses on web content and mobile apps. The Department also clarified in the section-by-section analysis of § 35.200 why it believes WCAG 2.1 Level AA is the appropriate technical standard for subpart H.

## Coordination With Other Federal and State Entities

One commenter asked if the Department has coordinated with State governments and other Federal agencies that are working to address web and mobile app accessibility to ensure there is consistency with other government accessibility requirements. Subpart H of this part is being promulgated under part A of title II of the ADA. The Department's analysis and equities may differ from State and local government entities that may also interpret and enforce other laws addressing the rights of people with disabilities. However, through the NPRM process, the Department received feedback from the public, including public entities, through written comments and listening sessions. In addition, the final rule and associated NPRM were circulated to other Federal Government agencies as part of the Executive Order 12866 review process. In addition, under Executive Order 12250, the Department also coordinates with other Federal agencies to ensure the consistent and effective implementation of section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability, and to ensure that such implementation is consistent with title II of the ADA across the Federal Government.<sup>[261]</sup> Accordingly, the Department will continue to work with other Federal agencies to ensure consistency with its interpretations in the final rule, in accordance with Executive Order 12250.

## Impact on State Law

<sup>[260]</sup> See §§ 35.130(b)(1)(ii) and (b)(7) and 35.160.

<sup>[261]</sup> Memorandum for Federal Agency Civil Rights Directors and General Counsels, from Kristen Clarke, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, Re: *Executive Order 12250 Enforcement and Coordination Updates* (Jan. 20, 2023), <https://www.justice.gov/media/1284016/dl?inline> [<https://perma.cc/AL6Q-QC57>]; Memorandum for Federal Agency Civil Rights Directors and General Counsels, from John M. Gore, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, Re: *Coordination of Federal Agencies' Implementation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act*, Civil Rights Division, U.S. Department of Justice (Apr. 24, 2018), <https://www.justice.gov/crt/page/file/1060321/download> [<https://perma.cc/9Q98-BVU2>].

Some commenters discussed how this part might impact State law, including one comment that asked how a public entity should proceed if it is subject to a State law that provides greater protections than this part. This part will preempt State laws affecting entities subject to title II of the ADA only to the extent that those laws provide less protection for the rights of individuals with disabilities.<sup>[262]</sup> This part does not invalidate or limit the remedies, rights, and procedures of any State laws that provide greater or equal protection for the rights of individuals with disabilities. Moreover, the Department's provision on equivalent facilitation at § 35.203 provides that nothing prevents a public entity from using designs, methods, or techniques as alternatives to those prescribed in subpart H of this part, provided that such alternatives result in substantially equivalent or greater accessibility and usability. Accordingly, for example, if a State law requires public entities in that State to conform to WCAG 2.2, nothing in subpart H would prevent a public entity from conforming with that standard.

## Preexisting Technology

One public entity said that the Department should permit public entities to continue to use certain older technologies, because some public entities have systems that were developed several years ago with technologies that may not be able to comply with this part. The commenter also added that if a public entity is aware of the technical difficulties or need for remediation in relation to recent maintenance, updates, or repairs, more leniency should be given to the public entity with respect to the compliance time frame.

The Department believes it has balanced the need to establish a workable standard for public entities with the need to ensure accessibility for people with disabilities in many ways, such as by establishing delayed compliance dates to give public entities time to ensure their technologies can comply with subpart H of this part. In addition, subpart H provides some exceptions addressing older content, such as the exceptions for archived web content, preexisting conventional electronic documents, and preexisting social media posts. The Department believes that these exceptions will assist covered entities in using their resources more efficiently. Also, the Department notes that public entities will be able to rely on the fundamental alteration or undue burdens and limitations in subpart H where they can satisfy the requirements of those provisions. Finally, the Department discussed isolated or temporary interruptions in § 35.205 of the section-by-section analysis, where it explained its decision not to separately excuse an entity's isolated or temporary noncompliance with § 35.200 due to maintenance or repairs.

## Overlays

Several comments expressed concerns about public entities using accessibility overlays and automated checkers.<sup>[263]</sup> Subpart H of this part sets forth a technical standard for public entities' web content and mobile apps. Subpart H does not address the internal policies or procedures that public entities might implement to conform to the technical standard under subpart H.

## ADA Coordinator

<sup>[262]</sup> See 42 U.S.C. 12201.

At least one commenter suggested that the Department should require public entities to hire an ADA Coordinator devoted specifically to web accessibility, similar to the requirement in the existing title II regulation at § 35.107(a). The Department believes it is important for public entities to have flexibility in deciding how to internally oversee their compliance with subpart H of this part. However, nothing in subpart H would prohibit a public entity from appointing an ADA coordinator for web content and mobile apps if the public entity believes taking such an action would help it comply with subpart H.

[AG Order No. 5919-2024, 89 FR 31338, Apr. 24, 2024]

[41] See W3C, *Web Content Accessibility Guidelines (WCAG) 2.1, Success Criterion 1.3.4 Orientation* (June 5, 2018), <https://www.w3.org/TR/2018/REC-WCAG21-20180605/#orientation> [<https://perma.cc/M2YG-LB9V>].

[59] Section 35.160.

## **Appendix E to Part 35—Guidance to Revisions to ADA Title II Regulation on Accessibility of Medical Diagnostic Equipment of State and Local Government Entities**

NOTE: This appendix contains guidance providing a section-by-section analysis of the revisions to this part published on August 9, 2024.

### **Section-by-Section Analysis and Response to Public Comments**

This appendix provides a detailed description of the Department's changes to this part (the title II regulation), the reasoning behind those changes, and responses to significant public comments received in connection with the rulemaking. The Department made changes to subpart A of this part and added subpart I to this part. The section-by-section analysis addresses the changes in the order they appear in the title II regulation.

#### **Subpart A—General**

#### **Section 35.104 Definitions**

The Department is revising § 35.104 to add definitions for the terms “medical diagnostic equipment” and “Standards for Accessible Medical Diagnostic Equipment.”

#### **Medical Diagnostic Equipment**

The Department is defining the term “medical diagnostic equipment,” consistent with the MDE Standards, as “[e]quipment used in, or in conjunction with, medical settings by health care providers for diagnostic purposes.” This definition includes the examples in 29 U.S.C. 794f, which requires the MDE Standards to set forth the minimum

[263] See W3C, *Overlay Capabilities Inventory: Draft Community Group Report* (Feb. 12, 2024), <https://a11yedge.github.io/capabilities/> [<https://perma.cc/2762-VJEV>]; see also W3C, *Draft Web Accessibility Evaluation Tools List*, <https://www.w3.org/WAI/ER/tools/> [<https://perma.cc/Q4ME-Q3VW>] (last visited Feb. 12, 2024).

technical criteria for medical diagnostic equipment used in (or in conjunction with) physicians' offices, clinics, emergency rooms, hospitals, and other medical settings, and also requires the MDE Standards to apply to equipment that includes examination tables, examination chairs (including chairs used for eye examinations or procedures and dental examinations or procedures), weight scales, mammography equipment, x-ray machines, and other radiological equipment commonly used for diagnostic purposes by health professionals. These examples are illustrative of some types of MDE but are not exhaustive. The Department received one comment recommending that the Department specifically require that diagnostic equipment used by optometrists and ophthalmologists be accessible. The regulatory text explains that MDE includes examination chairs used for eye examinations or procedures, but the Department cannot and need not provide an exhaustive list of all medical specialties whose equipment is covered by subpart I of this part. Equipment is covered by subpart I if health care providers use it in, or in conjunction with, medical settings for diagnostic purposes.

The Department received several comments requesting clarification on whether the definition of "medical diagnostic equipment" applies to equipment used outside of a medical facility, such as in home settings, mobile health clinics, or through telehealth appointments or remote diagnostic assessments. Some commenters recommend that the Department explicitly state that the definition of "medical diagnostic equipment" extends to equipment used in such settings.

MDE is "[e]quipment used in, or in conjunction with, medical settings by health care providers for diagnostic purposes," and the obligations set forth in subpart I of this part apply to "service[s], program[s], or activit[ies] offered through or with the use of MDE," subject to the limitations described in subpart I. Whether a public entity needs to ensure that a specific piece of equipment used in the provision of health care services, programs, or activities in home or other settings complies with the MDE Standards would depend on the particular factual circumstances in question.

## Standards for Accessible Medical Diagnostic Equipment

The Department is defining the term "Standards for Accessible Medical Diagnostic Equipment" in accordance with the standards promulgated by the Access Board on January 9, 2017, under section 510 of the Rehabilitation Act of 1973, as amended, and codified on July 1, 2017, found at 36 CFR part 1195 (revised as of July 1, 2017). That is the version of the Access Board's MDE Standards that was in effect when the Department issued its notice of proposed rulemaking (NPRM).<sup>[1]</sup> The Department is not, however, adopting two provisions that were included in the January 9, 2017, version of the Access Board's standards, M301.2.2 and M302.2.2 ("the sunset provisions"). The sunset provisions stated that the 17-inch to 19-inch low transfer height range set forth in M301.2.1 and M302.2.1 would cease to have effect on January 10, 2022.<sup>[2]</sup> Accordingly, if the definition of the MDE Standards that the Department is adopting did not exclude the sunset provisions, there would be no enforceable minimum low transfer height standard, since this final rule is being promulgated after January 10, 2022. By adopting the January 9, 2017, version of the MDE Standards that was codified on July 1, 2017, but excluding the sunset provisions, the Department is adopting and making enforceable the 17-inch to 19-inch low transfer height range set forth in M301.2.1 and M302.2.1 of the January 9, 2017, version of the MDE Standards. Under the final rule, public entities acquiring accessible MDE have the option of acquiring MDE that lowers to between 17 inches and 19 inches. However, under § 35.212(a), public entities are required to operate their services, programs, and activities that use MDE so that they are readily accessible to and usable by individuals with disabilities, regardless of whether the entities' MDE lowers to 17 inches or 19 inches.

Several commenters submitted comments on the low transfer height requirement. One commenter recommended that the Department make the temporary low transfer height range a permanent requirement. Some commenters expressed concern about the feasibility of complying with a 17-inch low transfer height standard, and several other commenters said the Department should adopt a 17-inch low transfer height standard in anticipation of the Access Board finalizing a 17-inch standard. As noted in the previous paragraph, the Department is adopting the 17-inch to 19-inch low transfer height range, without adopting the sunset provisions. The Department believes it is appropriate to adopt the MDE Standards promulgated by the Access Board, which were the product of a multi-year deliberative process. As to the comments supporting or opposing a 17-inch low transfer height standard, the Access Board had not yet issued a final rule establishing a 17-inch low transfer height standard when the Department issued its NPRM. Therefore, it would have been premature for the Department to have sought public comment on or proposed adopting the 17-inch standard in the NPRM, and the Department declines to adopt and make enforceable such a standard in the final rule without public comment. As noted in section II.C of the preamble to the final rule, however, since the Access Board has now issued a final rule updating the low transfer height standard, the Department will consider issuing a supplemental rulemaking under title II proposing to adopt it, and the Department will solicit comments on the updated standard as part of any such rulemaking.

Some commenters urged the Department to work with the Access Board to account for the needs of particular disability groups more explicitly. Commenters asked that the Department consider more specifically the needs of individuals with nonmobility disabilities, people with respiratory disabilities, people who are blind or have other sensory disabilities, higher weight people, and people with intellectual disabilities. The MDE Standards account for the needs of individuals with nonmobility disabilities to some extent,<sup>[3]</sup> and any new standards to account for additional disabilities or factors that the Access Board did not incorporate into the MDE Standards should be developed by the Access Board, which has authority to promulgate such standards under section 510. The Department notes that the Access Board received comments recommending that the MDE Standards address “individuals with autism, Alzheimer’s, sensory disabilities, cognitive disabilities, and bariatric patients,” and noted that while it could not accommodate those comments in this round of rulemaking, it committed to “address[ing] other barriers in future updates to the MDE Standards.”<sup>[4]</sup> Therefore, while the Department appreciates commenters’ viewpoints, it declines to update this part to account for additional disabilities or factors at this time.

The Department also received many comments from diverse stakeholders on whether the Department should apply the Access Board’s MDE Standards to medical equipment that is not used for diagnostic purposes. Many commenters supported applying the MDE Standards to nondiagnostic medical equipment, especially equipment used for therapeutic or treatment purposes. Other commenters urged the Department not to expand the requirements beyond MDE at this time. Some commenters also stated that the Department lacks technical

<sup>[2]</sup> 36 CFR part 1195, appendix, section M301.2.2 (stating that M301.2.1 and M302.2.1 would cease to have effect on January 10, 2022).

<sup>[1]</sup> Although HHS’s final rule addressing the accessibility of medical diagnostic equipment under section 504 contains a different citation in its definition of the term *Standards for Accessible Medical Diagnostic Equipment*, see 89 FR 40184, that difference is the result of citation formatting conventions of the Office of the Federal Register. There is no substantive difference between the definition of the term *Standards for Accessible Medical Diagnostic Equipment* adopted in HHS’s final rule and the definition of that term adopted in DOJ’s final rule.

<sup>[4]</sup> *Id.* at 2812.

<sup>[3]</sup> See, e.g., 36 CFR part 1195, appendix (revised as of July 1, 2017) (discussing, in M306, requirements for communication necessary for performance of a diagnostic procedure).

expertise to unilaterally impose technical standards on a broad range of nondiagnostic medical equipment. One commenter recommended that if the Department adopts enforceable standards regarding the accessibility of nondiagnostic medical equipment, the Department should first explain its proposed approach in detail to allow for additional public input on the types of nondiagnostic medical equipment to which those standards would apply.

The Department agrees that any extension of the MDE Standards to nondiagnostic medical equipment, or the adoption of any new standards for nondiagnostic medical equipment, should be informed by the Access Board's extensive knowledge and technical acumen, as well as by additional public input. If, in the future, the Department adopts enforceable technical standards concerning the accessibility of nondiagnostic medical equipment, it will consult with the Access Board and other Federal partners and make clear to covered entities what types of equipment will be required to meet those standards. But because the Access Board has not developed specific technical standards regarding the accessibility of nondiagnostic medical equipment, and given the need to provide public entities with clarity about the scope of any standards the Department is adopting, the Department declines to adopt enforceable technical standards for nondiagnostic medical equipment or otherwise extend the Access Board's standards at this time.

The Access Board's standards apply only to equipment that is used in, or in conjunction with, medical settings by health care providers for diagnostic purposes. As noted in the NPRM, equipment used for both diagnostic purposes and other purposes (such as therapeutic or treatment purposes) is MDE if it otherwise meets this definition, and must therefore meet the requirements for accessible MDE set forth in subpart I of this part. The Department will continue to consider whether to conduct further rulemaking in the future.

Several commenters emphasized the importance of accessibility in the provision of health care services that use medical equipment, whether that equipment is used for diagnostic purposes or not. The Department clarifies that public entities are already obligated to ensure that their services, programs, and activities do not exclude or discriminate against individuals with disabilities and are readily accessible to and usable by individuals with disabilities.<sup>[5]</sup> This obligation encompasses the provision of health care services by public entities, whether those services use MDE or not.

## Subpart I—Accessible Medical Diagnostic Equipment

The Department is creating a new subpart in its title II regulation. Subpart I of this part addresses the accessibility of public entities' medical diagnostic equipment.

### Section 35.210 Requirements for Medical Diagnostic Equipment

This section provides general accessibility requirements for services, programs, and activities that public entities provide through or with the use of MDE. Public entities must ensure that their services, programs, and activities offered through or with the use of MDE are accessible to individuals with disabilities.

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<sup>[5]</sup> See, e.g., §§ 35.130 and 35.150.

Under this general provision (barring an applicable limitation or defense), a public entity that provides health care cannot deny services that it would otherwise provide to a patient with a disability because the provider lacks accessible MDE. A provider also cannot require a patient with a disability to bring someone along with them to help during an examination if similar requirements are not imposed on patients without disabilities. A patient may choose to bring another person such as a friend, family member, or personal care aide to an appointment, but regardless, the provider may need to provide reasonable assistance to enable the patient to receive medical care.<sup>[6]</sup> Such assistance may include, for example, helping a person who uses a wheelchair to transfer from their wheelchair to the examination table or diagnostic chair.<sup>[7]</sup> The provider cannot require the person accompanying the patient to assist.

Individuals and groups, including disability advocacy organizations, individuals with disabilities and their family members, health care providers and associations, and manufacturers of medical equipment, submitted comments on the Department's proposed rule. Overwhelmingly, the commenters expressed strong support for adopting the MDE Standards and requiring public entities to ensure that their services, programs, and activities offered through or with the use of MDE are accessible to individuals with disabilities.

Many commenters described the importance of accessible MDE and provided firsthand accounts of instances when they or their family members were unable to receive health care or received substandard health care because providers lacked accessible examination tables, weight scales, or radiological or other diagnostic equipment. Several commenters recounted instances when they or their family members were unable to receive preventative health care services such as mammograms, prostate examinations, or dental examinations. Other commenters noted that they could not have their weight checked regularly because of the lack of accessible weight scales, resulting in health care risks such as a failure to provide the amount of medication required. Some commenters described entities' expectations that individuals with mobility disabilities would be accompanied by companions to physically transfer them onto MDE. Disability advocacy groups also shared representative accounts submitted by their members, documenting the harms experienced by people with disabilities due to health care providers' lack of accessible MDE.

The Department agrees with commenters that accessible MDE is vital for health equity, person-centered care, and access to medical care for patients with disabilities. As discussed in the NPRM, research has documented that the scarcity of accessible MDE constitutes a significant barrier to access to care for patients with disabilities, resulting in a failure to provide adequate preventative health care and diagnostic examinations.<sup>[8]</sup>

As explained in more detail in the NPRM, the Department is aware of many instances in which people with disabilities were denied access to needed care, were subjected to demeaning situations, or received substandard care because health care providers lacked accessible MDE.<sup>[9]</sup> The Department has taken action to enforce the ADA as it applies to the provision of health care services.<sup>[10]</sup> However, the lack of technical standards for accessible MDE before the Access Board issued the MDE Standards in 2017, and the fact that, until now, the MDE Standards were

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<sup>[7]</sup> See U.S. Dep't of Just., Civ. Rts. Div., *Access to Medical Care for Individuals with Mobility Disabilities* (June 26, 2020), <https://www.ada.gov/resources/medical-care-mobility/> [<https://perma.cc/UH8Y-NZWL>].

<sup>[6]</sup> See *id.* § 35.130(b)(7).

<sup>[8]</sup> 89 FR 2186.

not enforceable under title II, mean that these circumstances remain all too prevalent. Section 35.210 will help clarify public entities' nondiscrimination obligations as they pertain to services, programs, and activities that use MDE.

## Section 35.211 Newly Purchased, Leased, or Otherwise Acquired Medical Diagnostic Equipment

For MDE that public entities purchase, lease, or otherwise acquire after October 8, 2024, which is 60 days after the publication of the final rule in the *FEDERAL REGISTER*, the Department is adopting an approach that draws on the approach that the existing title II regulation applies to new construction and alterations of buildings and facilities.<sup>[11]</sup> Section 35.211(a) requires that all MDE that a public entity purchases, leases, or otherwise acquires more than 60 days after publication must be accessible, unless and until the scoping requirements set forth in more detail in § 35.211(b) are satisfied.

As in the fixed or built environment, the accessibility of MDE is governed by a specific set of design standards promulgated by the Access Board that sets forth technical requirements for accessibility. So long as a public entity has the amount of accessible MDE set forth in the scoping requirements, the public entity is not required to continue to obtain accessible MDE when it purchases, leases, or otherwise acquires MDE after the final rule's effective date. However, a public entity may choose to acquire additional accessible MDE even after it satisfies the scoping requirements.

## Section 35.211(a) Requirements for Newly Purchased, Leased, or Otherwise Acquired Medical Diagnostic Equipment

Paragraph (a) adopts the January 9, 2017, version of the Access Board's MDE Standards that was codified on July 1, 2017 (with the exception of the Access Board's sunset provisions, as explained in the section-by-section analysis of the definition of the term "Standards for Accessible Medical Diagnostic Equipment" in § 35.104), as the standard governing whether MDE is accessible, and establishes one of the key requirements of subpart I of this part: that subject to applicable limitations and defenses, all MDE that public entities purchase, lease, or otherwise acquire more than 60 days after the publication of the final rule must meet the MDE Standards unless and until the public entity already has a sufficient amount of accessible MDE to satisfy the scoping requirements in § 35.211(b).

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<sup>[10]</sup> See, e.g., Settlement Agreement Between the United States and Charlotte Radiology, P.A. (Aug. 13, 2018), [https://archive.ada.gov/charlotte\\_radiology\\_sa.html](https://archive.ada.gov/charlotte_radiology_sa.html) [<https://perma.cc/ZC5W-LV3M>]; Settlement Agreement Between the United States and Tufts Medical Center (Feb. 28, 2020), [https://archive.ada.gov/tufts\\_medical\\_ctr\\_sa.html](https://archive.ada.gov/tufts_medical_ctr_sa.html) [<https://perma.cc/YQG3-ZDZC>].

<sup>[9]</sup> *Id.*

<sup>[11]</sup> See generally § 35.151.

As explained in more detail in section II.C of the preamble to the final rule ("Overview of Access Board's MDE Standards"), the MDE Standards include technical criteria for equipment that is used when patients are (1) in a supine, prone, or side-lying position; (2) in a seated position; (3) in a wheelchair; or (4) in a standing position. They also contain standards for supports, communication, and operable parts. In addition, the MDE Standards contain requirements for equipment to be compatible with patient lifts where a patient would transfer under positions (1) and (2).

Consistent with the language in 29 U.S.C. 794f(b), MDE covered under subpart I of this part includes examination tables, examination chairs (including chairs used for eye examinations or procedures and dental examinations or procedures), weight scales, mammography equipment, x-ray machines, and other radiological equipment commonly used for diagnostic purposes by health professionals. As noted in the section-by-section analysis of § 35.104, subpart I of this part covers medical equipment used by health professionals for diagnostic purposes even if it is also used for treatment purposes. Given the many barriers to health care that people with disabilities encounter due to inaccessible MDE, adopting the MDE Standards will give many people with disabilities an equal opportunity to participate in and benefit from public entities' health care services, programs, and activities.

In the NPRM, the Department sought comment on whether 60 days is an appropriate amount of time for these requirements to take effect. A number of commenters said 60 days is the right amount of time, including one commenter who recommended no more than 60 days and another who recommended no less than 60 days. However, a few commenters thought 60 days would not be enough time to comply with these requirements. Those commenters expressed concern that it could be difficult for public entities to obtain accessible MDE and carry out this section's requirements within 60 days, and that a 60-day requirement would be too burdensome for small or under-resourced public entities in particular. One commenter said 60 days is the right amount of time for MDE that does not require construction, but that a longer timeframe should apply to MDE that necessitates construction in the room in which the MDE will be located, such as magnetic resonance imaging ("MRI") scanners. One commenter recommended 180 days, not 60 days, to give public entities time to carry out this section's requirements, and asked the Department to clarify whether public entities will be expected to comply with the scoping requirements set forth in § 35.211(b) upon the effective date of the final rule or later. The commenter recommended that public entities be given at least two years from the final rule's publication date to achieve compliance with the scoping requirements.

The Department agrees with the majority of commenters who commented on this issue and concludes that 60 days is the appropriate amount of time for the requirements set forth in § 35.211(a) to take effect because it strikes an appropriate balance between the immediate and urgent health care needs of individuals with disabilities and the constraints facing public entities. Therefore, all MDE that public entities acquire more than 60 days after publication shall meet the MDE Standards, unless and until the scoping requirements in § 35.211(b) are met. In response to the commenters who are concerned that a 60-day time period will be too burdensome, the Department notes that public entities are not required to take steps that would result in an undue burden or a fundamental alteration, as set forth in more detail in § 35.211(e). The Department also notes that public entities have been on notice since the NPRM was issued in January 2024 that the Department was considering imposing this requirement, giving them time to prepare to carry out the requirements of subpart I of this part.

The Department also clarifies that, once it takes effect 60 days after publication, § 35.211(a) will only require MDE to meet the MDE Standards if it is acquired after the effective date (subject to the scoping requirements and the other requirements and limitations of subpart I of this part). That means, for example, that if a public entity does not acquire any MDE until 180 days after publication, the MDE that the entity acquires 180 days after publication will be required to meet the MDE Standards (assuming the entity has not already met the scoping requirements and no limitations apply), but the entity's existing MDE will not be required to meet the MDE Standards. In other words, although the timeframe set forth in § 35.211(a) is 60 days after publication, the question of when a particular public

entity's MDE will be required to meet the MDE Standards will depend on when the entity acquires MDE after publication, which could be more than 60 days after publication. This reinforces the Department's conclusion that 60 days is the appropriate amount of time for § 35.211(a) to take effect.

The Department also clarifies that to "purchase, lease, or otherwise acquire" MDE more than 60 days after publication means to acquire MDE by any means. A few commenters requested that the Department make clear that leases include lease renewals, and that acquisitions include acquisitions in any form, including, but not limited to, acquisitions via gifts or loans, as well as both temporary and permanent acquisitions. To avoid any confusion, the Department is clarifying in the § 35.211(a) regulatory text that the term "lease" includes the renewal of existing leases. The Department's intent is that the term "lease" includes lease renewals, and it is modifying the § 35.211(a) regulatory text to avoid any confusion. The Department also agrees with commenters that to "purchase, lease, or otherwise acquire" MDE in the context of subpart I of this part means to acquire MDE through any means, including, but not limited to, acquisitions via donations or loans, as well as both temporary and permanent acquisitions. This intent is reflected by the term "otherwise acquire" in the regulatory text.

## Section 35.211(b) Scoping

Section 35.211(b) establishes scoping requirements for accessible MDE. Accessibility standards generally contain scoping requirements (how many accessible features are needed) and technical requirements (what makes a particular feature accessible). For example, the 2010 ADA Standards provide scoping requirements for how many toilet compartments in a particular toilet room must be accessible and provide technical requirements on what makes these toilet compartments accessible.<sup>[12]</sup> The MDE Standards issued by the Access Board contain technical requirements, but they do not specify scoping requirements. Rather, they state that "[t]he enforcing authority shall specify the number and type of diagnostic equipment that are required to comply with the MDE Standards."<sup>[13]</sup> For the technical requirements to be implemented and enforced effectively, it is necessary for the Department to provide scoping requirements to specify how much accessible MDE is needed for a public entity's health care service, program, or activity to comply with the ADA.

Paragraphs (b)(1) through (3) of § 35.211 lay out scoping requirements for this section. The scoping requirements that the Department is establishing are based on the requirements that the 2010 ADA Standards establish for accessible patient sleeping rooms and parking in hospitals, rehabilitation facilities, psychiatric facilities, detoxification facilities, and outpatient physical therapy facilities.<sup>[14]</sup> Because public entities must comply with title II of the ADA, many public entities are likely already familiar with these standards.

The Department drew on the following approaches from the 2010 ADA Standards in formulating the scoping requirements for the final rule. According to the 2010 ADA Standards, licensed medical care facilities and licensed long-term care facilities where the period of stay exceeds 24 hours shall provide accessible patient or resident sleeping rooms and disperse them proportionately by type of medical specialty.<sup>[15]</sup> Where sleeping rooms are altered or added, the sleeping rooms being altered or added shall be made accessible until the minimum number of accessible sleeping rooms is provided.<sup>[16]</sup> Hospitals, rehabilitation facilities, psychiatric facilities, and detoxification

[13] 36 CFR part 1195, appendix, section M201 (revised as of July 1, 2017).

[12] See 36 CFR part 1191, appendix B, section 213.3.1.

[14] See 36 CFR part 1191, appendix B, sections 208.2.2, 223.2.1, 223.2.2.

facilities that do not specialize in treating conditions that affect mobility shall have at least 10 percent of their patient sleeping rooms, but no fewer than one sleeping room, provide specific accessibility features for patients with mobility disabilities.<sup>[17]</sup> Hospitals, rehabilitation facilities, psychiatric facilities, and detoxification facilities that specialize in treating conditions that affect mobility must have 100 percent of their patient sleeping rooms provide specific accessibility features for patients with mobility disabilities.<sup>[18]</sup> In addition, at least 20 percent of patient and visitor parking spaces at outpatient physical therapy facilities and rehabilitation facilities specialized in treating conditions that affect mobility must be accessible.<sup>[19]</sup> Several of these approaches are reflected in the scoping requirements adopted in paragraph (b) of § 35.211 for MDE.

Paragraph (b)(1) of § 35.211 provides the general requirement for physicians' offices, clinics, emergency rooms, hospitals, outpatient facilities, multi-use facilities, and other medical services, programs, and activities that do not specialize in treating conditions that affect mobility. When these entities use MDE to provide services, programs, or activities, they must ensure that at least 10 percent, but no fewer than one unit, of each type of equipment complies with the MDE Standards. For example, a medical practice with 20 examination chairs must have 2 examination chairs (10 percent of the total) that comply with the MDE Standards. In a medical practice with five examination chairs, the practice must have one examination chair that complies with the MDE Standards (because every entity covered by this provision must have no fewer than one unit of each type of equipment that is accessible). If a dental practice has one x-ray machine, that x-ray machine must be accessible. However, these requirements do not apply until an entity newly acquires MDE, as explained in the section-by-section analysis of § 35.211(a).

Paragraph (b)(2) of § 35.211 provides the scoping requirement for rehabilitation facilities that specialize in treating conditions that affect mobility; outpatient physical therapy facilities; and other medical services, programs, and activities that specialize in treating conditions that affect mobility. This paragraph requires that at least 20 percent of each type of MDE used in these types of services, programs, and activities, but no fewer than one unit of each type of MDE, must comply with the MDE Standards. Because these facilities specialize in treating patients who are likely to need accessible MDE, it is reasonable for them to be required to have more accessible MDE than is required for the health care providers covered by paragraph (b)(1), who do not have the same specialization. As with paragraph (b)(1), the scoping requirements of paragraph (b)(2) do not apply until an entity newly acquires MDE.

The Department received many comments on the scoping percentages in § 35.211(b)(1) and (2). Many commenters acknowledged the need to provide accessible MDE and supported the inclusion of scoping requirements. Some commenters expressed concern that the scoping requirements could have a profound financial and operational impact on small hospitals, potentially leading to reduced availability of essential diagnostic services in rural and underserved areas; expressed concern about the amount of accessible MDE currently available on the market; or requested more time to acquire MDE that meets the MDE Standards and resources to help health care providers comply. Many other commenters, including disability advocates and disability rights organizations, voiced concerns that the scoping provisions are too low to meet demand among people with mobility disabilities. Without a requirement that a larger percentage of MDE or 100 percent of MDE be accessible, they asserted that patients with disabilities will have fewer scheduling options or longer wait times than nondisabled patients. One

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<sup>[19]</sup> See *id.* section 208.2.2.

<sup>[18]</sup> See *id.* section 223.2.2.

<sup>[17]</sup> See *id.* section 223.2.1.

<sup>[16]</sup> See 36 CFR part 1191, appendix B, section 223.1.1.

<sup>[15]</sup> See § 35.151(h); 36 CFR part 1191, appendix B, section 223.1.

commenter also stated that it would be simpler and clearer to require all newly acquired MDE to be accessible. Another commenter noted that while it would be ideal for all MDE to be accessible, this would place an undue burden on health care providers, and the needs of individuals with disabilities can be fully addressed if health care providers have some accessible MDE and engage in proper planning to prevent delays and denials in the delivery of health care services.

Many of the commenters who viewed the scoping requirements as too low objected to modeling the scoping requirements on the requirements that the 2010 ADA Standards establish for accessible patient sleeping rooms and parking in hospitals, rehabilitation facilities, psychiatric facilities, detoxification facilities, and outpatient physical therapy facilities. Those commenters cited factors such as the prevalence of disability; the belief that accessible MDE is more in demand than accessible parking spaces; and the fact that, unlike accessible parking spaces, accessible MDE can also be used by nondisabled individuals. Some commenters suggested instead modeling the scoping requirements on the "replacement rule" that applies to transportation services under title II, which requires that all newly purchased and leased vehicles be readily accessible to and usable by people with disabilities.<sup>[20]</sup> Other commenters suggested different approaches, such as imposing higher scoping requirements for MDE that is used to provide preventive services outlined by the U.S. Preventive Services Task Force, or imposing higher scoping requirements for MDE that is used more frequently.

While several commenters opposed having different scoping requirements in § 35.211(b)(1) and (2), others supported the approach of imposing a higher scoping requirement in § 35.211(b)(2) (for facilities that specialize in treating conditions that affect mobility) than in § 35.211(b)(1) (for other facilities). Other commenters noted the importance of considering the department and type of facility in formulating the scoping requirements.

The Department appreciates all of the comments on the scoping requirements in § 35.211(b). The Department acknowledges the concerns of commenters who believe health care providers might have difficulty complying with the scoping requirements, as well as the countervailing concerns of commenters seeking more stringent scoping requirements. As discussed in section III.A.2 of the preamble to the final rule, the Department certifies that the final rule will not have a significant impact on a substantial number of small entities. While the Department appreciates that the final rule may result in increased demand for accessible MDE, commenters did not submit data to suggest that the market cannot bear the additional demand. In any case, if equipment that meets the MDE Standards is unavailable, the fundamental alteration or undue burdens limitations may apply, as explained in § 35.211(e).

The Department recognizes that there are many potential models on which it could base its scoping requirements and acknowledges that the needs underlying the accessible parking model are not perfectly aligned with the needs underpinning accessible MDE. However, the Department continues to believe that the use of MDE is analogous to the use of parking spaces at rehabilitation facilities because, as with parking spaces, several different patients with mobility disabilities can use the same piece of MDE in a day.

As explained in the NPRM, the Department considered whether to require 100 percent of MDE in these programs to be accessible, like section 223.2.2 of the 2010 ADA Standards, which requires that 100 percent of patient sleeping rooms in similar facilities provide specific accessibility features for patients with mobility disabilities. The Department concluded that the time-limited use of MDE is more analogous to the use of parking spaces at a rehabilitation facility than to the use of sleeping rooms because, unlike MDE, sleeping rooms are generally occupied for all or a significant part of the day. Thus, § 35.211(b) draws on the 2010 ADA Standards' scoping requirements by

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<sup>[20]</sup> See 49 CFR part 37, subpart D.

requiring, in § 35.211(b)(1), at least 20 percent (but no fewer than one unit) of each type of equipment in use in facilities that specialize in treating conditions that affect mobility to meet the MDE Standards, and requiring, in § 35.211(b)(2), at least 10 percent (but no fewer than one unit) of each type of equipment in use in other facilities to meet the MDE Standards. Imposing higher scoping requirements for facilities that specialize in the treatment of conditions that affect mobility has proven to be a workable framework in the context of the 2010 ADA Standards' scoping requirements, and the Department believes this will also be a helpful framework for the MDE scoping requirements.

In view of demands on provider entities,<sup>[21]</sup> the Department will not increase the scoping requirements beyond 10 percent for § 35.211(b)(1) and 20 percent for § 35.211(b)(2) at this time. The Department does not agree with several commenters who opined that the use of MDE is analogous to the use of vehicles covered by the ADA title II transportation accessibility requirements. MDE often cannot be retrofitted to be accessible with the same ease or cost ratio as transportation retrofits. For example, inaccessible weight scales typically do not have large platforms that are required for wheelchair access. Inaccessible examination tables are usually fixed height "box" tables with static bases, and possibly drawers, that cannot easily be replaced with adjustable mechanisms.<sup>[22]</sup> The Department therefore declines to adopt an approach akin to the "replacement rule" that applies in the title II transportation accessibility context, which would require that 100 percent of newly acquired MDE be accessible.<sup>[23]</sup> And although one commenter suggested relying on the U.S. Preventive Services Task Force recommendations, the Department does not believe that these recommendations would serve as a useful basis for the scoping requirements in § 35.211(b). The U.S. Preventive Services Task Force makes evidence-based recommendations on clinical preventive services and health promotion in primary care settings,<sup>[24]</sup> but those recommendations are not primarily about the use of MDE and therefore do not serve as a useful model for scoping requirements related to MDE.

The Department also does not believe it is necessary to impose higher scoping requirements for MDE that is used more frequently than other types of MDE, as some commenters suggested. Providers are likely to have more units of the types of MDE that are used more frequently, and the more units of MDE a provider has, the more units will need to be accessible according to the scoping requirements.

The Department therefore will not increase the scoping requirements set forth in § 35.211(b) at this time or eliminate the distinction between the general scoping requirements in § 35.211(b)(1) and the scoping requirements for facilities that specialize in treating conditions that affect mobility in § 35.211(b)(2). The Department notes that, because paragraph (b) requires that at least one unit of each type of MDE in use meet the MDE Standards irrespective of the percentage requirements, some smaller health care providers will be required to have a proportion of accessible MDE that exceeds 10 percent for paragraph (b)(1) or 20 percent for paragraph (b)(2). For example, barring an applicable limitation or defense, a provider with two dental chairs will be required to have at least one dental chair that meets the MDE Standards, which is 50 percent of the provider's total.

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<sup>[24]</sup> See U.S. Preventive Services Task Force, *About the USPSTF*, <https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf> [<https://perma.cc/FTL2-TLXX>].

<sup>[23]</sup> See 49 CFR part 37, subpart D.

<sup>[22]</sup> ADA Nat'l Network, *Accessible Medical Examination Tables and Chairs* (2017), <https://adata.org/factsheet/accessible-medical-examination-tables-and-chairs> [<https://perma.cc/Y6MR-9QGL>].

<sup>[21]</sup> See FRIA at 69-70 (considering the costs of increasing the scoping requirements in § 35.211(b)(1) and (2) to 20 percent and 40 percent respectively, as well as the costs of requiring that 100 percent of newly acquired MDE meet the MDE Standards and concluding that those alternative potential scoping requirements could more than double the annualized costs of the final rule).

The Department also clarifies that the scoping requirements set forth in § 35.211(b) must be read in conjunction with the requirements set forth elsewhere in subpart I of this part. Section 35.210 prohibits public entities from excluding, denying benefits to, or otherwise discriminating against people with disabilities in services, programs, or activities that use MDE, and § 35.212 requires that each service, program, or activity that uses MDE be readily accessible to and usable by people with disabilities in its entirety, independent of the scoping requirements for newly acquired MDE set forth in § 35.211(b). That means, for example, that denying a physical examination to a patient with a disability because of the lack of accessible MDE may violate the nondiscrimination obligation set forth in § 35.210, even if the scoping requirements set forth in § 35.211(b)(1) and (2) have not yet been triggered by the new acquisition of MDE. As another example, if, even after a provider complies with the scoping requirements set forth in § 35.211(b)(1) and (2), patients with disabilities have significantly fewer scheduling options than nondisabled patients, that could implicate the obligation in § 35.212 to make public entities' services, programs, and activities readily accessible to and usable by individuals with disabilities. Public entities may determine that the most effective way to carry out the obligations set forth in §§ 35.210 and 35.212 will be to acquire additional accessible MDE beyond the scoping requirements set forth in § 35.211(b)(1) and (2).

Finally, one commenter requested clarification on whether the required number of units of accessible MDE should be rounded up or down if application of the scoping percentages does not yield a whole number. If application of the scoping percentages yields a number less than one, the number will need to be rounded up to one because § 35.211(b)(1) and (2) require that no fewer than one unit of each type of equipment in use meet the MDE Standards. If application of the scoping percentages yields a number greater than one, the standard mathematics rule on rounding decimals to whole numbers applies to the scoping requirements in § 35.211(b)(1) and (2).<sup>[25]</sup>

Section 35.211(b)(3) addresses facilities or programs with multiple departments, clinics, or specialties. In any facility or program that has multiple departments, clinics, or specialties, where a service, program, or activity utilizes MDE, the accessible MDE required by paragraphs (b)(1) and (2) shall be dispersed proportionately across departments, clinics, or specialties. For example, a hospital that is required to have five accessible x-ray machines cannot place all the accessible x-ray machines in the orthopedics department and none in the emergency department. This dispersion requirement is analogous to the existing title II ADA regulation that requires dispersion of accessible sleeping rooms in medical care facilities that do not specialize in the treatment of conditions that affect mobility.<sup>[26]</sup>

[25] That is, numbers that end in a digit less than five are rounded down to the nearest whole number, and numbers that end in a digit greater than or equal to five are rounded up to the nearest whole number. For example, if a program that did not specialize in treating conditions that affect mobility used four units of MDE, then it would be required to have at least one unit of accessible MDE because, even though 0.4 units (10 percent of four) would be rounded down to zero, the final rule requires that each service, program, or activity have at least one unit of accessible MDE. If there were 12 units of MDE in use, the program would be required to have one unit of accessible MDE because 1.2 (10 percent of 12) is rounded down to one. If there were 15 units of MDE in use, the program would be required to have two units of accessible MDE because 1.5 (10 percent of 15) is rounded up to two.

[26] See § 35.151(h). A similar dispersion requirement was not necessary for medical care facilities that specialize in the treatment of conditions that affect mobility because all patient sleeping rooms in those facilities are required to be accessible. See 36 CFR part 1191, appendix B, section 223.2.2.

Section 35.211(b)(3) does not require that accessible MDE be dispersed with exact mathematical proportionality, which at times would be impossible. Section 35.211(b)(3) also does not require public entities to acquire additional MDE, beyond the amount specified in paragraphs (b)(1) and (2), to ensure that accessible MDE is available in every department, clinic, and specialty. This approach is consistent with many provisions of the 2010 ADA Standards.<sup>[27]</sup> Additionally, if § 35.211(b)(3) were to require full dispersion across every department, clinic, and specialty, it could create inconsistency or confusion between the dispersion and scoping requirements. For example, if a health care program that operated out of three clinics was required to have two units of accessible MDE according to the scoping provisions, then if paragraph (b)(3) required public entities to disperse their accessible MDE across every department, clinic, and specialty, the entity could meet the scoping requirements but would nonetheless violate the dispersion requirements because the two units of accessible MDE that the scoping provision required would not be enough to fully disperse across all three clinics. If paragraph (b)(3) required public entities to disperse fully across every department, clinic, and specialty, it could also be difficult to determine whether more precise dispersion requirements had been met. For example, a clinic may be part of a department and also part of a specialty (or include providers with multiple specialties), so determining whether accessible MDE was dispersed with precision across each department, clinic, and specialty could become complex.

Even if a public entity's facility or program with multiple departments, clinics, or specialties will not be able to disperse its accessible MDE with mathematical precision across every department, clinic, and specialty, public entities must still afford people with disabilities an opportunity to benefit from each type of medical care that is equal to the opportunity provided to people without disabilities.<sup>[28]</sup> The Department recognizes that it is critically important for people with disabilities to have access to all types of medical care. Therefore, public entities are still required to ensure that all of their services, programs, and activities are accessible to and usable by individuals with disabilities, regardless of whether the dispersion provision in paragraph (b)(3) requires a specific department, clinic, or specialty to have accessible MDE.

The Department appreciates the comments it received on its proposed dispersion requirements. Though some commenters supported the Department's proposed approach to dispersion, many commenters did not believe the dispersion requirements were sufficient to meet the needs of individuals with disabilities. These commenters felt that additional requirements should be added to ensure adequate dispersion. Commenters proposed a range of different requirements, including requirements for each department or specialty; for every floor and building; for each facility; for every subpart of a larger entity that has the capacity to manage its own booking system; and for a particular geographic radius. Some commenters also proposed that each department, clinic, or specialty be required to have one or two examination tables and weight scales. One commenter supported a flexible approach to dispersion, whereby accessible MDE would be made available where it is needed.

For the reasons discussed in the section-by-section analysis of § 35.211(b), the Department continues to believe that the approach to dispersion set forth in § 35.211(b)(3) is appropriate and consistent with existing law. In light of the demands that increased dispersion requirements would impose on public entities, the Department is not

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<sup>[27]</sup> See, e.g., 36 CFR part 1191, appendix B, sections 221.2.3, 224.5, 225.3.1, 235.2.1. According to these sections, when the required number of accessible elements has been provided, further dispersion is not required.

<sup>[28]</sup> See §§ 35.130(b)(1)(ii) and 35.150(a).

expanding the dispersion requirements at this time. However, the Department emphasizes that compliance with the dispersion requirement does not excuse public entities from complying with their nondiscrimination obligations under the existing title II regulation or §§ 35.210 and 35.212.

The National Council on Disability, an independent Federal agency charged with advising the President, Congress, and other Federal agencies on policies, programs, practices, and procedures that affect people with disabilities, stated that the Department should require that as a facility or program acquires accessible MDE, it should ensure that at least one accessible examination table and one weight scale are located in every department, clinic, or specialty. The Department declines to adopt this suggestion so that public entities will retain the flexibility to determine how they will comply with the dispersion requirements in § 35.211(b)(3), in light of each public entity's particular circumstances. Though the text of § 35.211(b)(3) requires public entities to disperse, in a proportionate manner, the accessible MDE required by paragraphs (b)(1) and (2), the Department encourages public entities to disperse all of their accessible MDE proportionately, where they have more accessible MDE than paragraphs (b)(1) and (2) require.

Other commenters proposed that the Department require the dispersion of equipment or personnel other than MDE, such as wheelchairs that can be used around MRI scanners and patient lifts or transfer teams, as well as the dispersion of MDE based on weight or size capacity. The Department declines to adopt requirements for the other types of dispersion proposed by these commenters at this time. In this rulemaking, the Department is adopting the January 9, 2017, version of the MDE Standards promulgated by the Access Board<sup>[29]</sup> (with the exception of the sunset provisions, as explained in the section-by-section analysis of § 35.104) and making those standards enforceable. The MDE Standards do not include requirements for wheelchairs, equipment with greater weight or size capacity, patient lifts, or transfer teams. The Department will relay the commenters' views to the Access Board for consideration if the Access Board revises the MDE Standards on this subject in the future.

Many commenters raised concerns about the burdens that the approach to dispersion in subpart I of this part could impose on people with disabilities. These included delays in diagnosis and care, with the possibility of associated harm to the patient's health or life; increased wait times; cancelled or rescheduled appointments; a lack of expertise if patients need to receive some care from other departments or specialties; less effective treatment; the need for accessible, affordable transportation to other locations where accessible MDE is available; a lack of choice for patients with disabilities about where they will receive care; a lack of privacy if accessible MDE is located in a shared space; and embarrassment, humiliation, frustration, stress, and pain.

The Department reiterates that the lack of additional or more specific dispersion requirements than those set forth in § 35.211(b)(3) does not excuse public entities from complying with their nondiscrimination obligations under the existing title II regulation or §§ 35.210 and 35.212. If public entities' dispersion of accessible MDE imposes the burdens on individuals with disabilities that some commenters described, then that situation could result in discrimination because the public entity's MDE is not readily accessible to and usable by persons with disabilities as required by § 35.210. Likewise, such a situation could result in the public entity's service, program, or activity in its entirety not being readily accessible to and usable by patients with disabilities as required by § 35.212. Public entities are encouraged to acquire additional accessible MDE and disperse that MDE across departments, clinics, and specialties to better meet the needs of patients with disabilities.

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<sup>[29]</sup> 36 CFR part 1195 (revised as of July 1, 2017).

One commenter proposed that the Department adopt a specific limit on wait times to ensure that people with disabilities do not have to wait significantly longer to access services than people without disabilities because of the amount of accessible MDE in a particular location or because patients need to travel to a different location to use accessible MDE. The Department declines to adopt a specific wait time limit because whether a particular wait time is justifiable may depend on the circumstances, including the overall demand for services and the wait times experienced by patients without disabilities. However, the Department notes that if patients with disabilities experience significantly longer wait times than patients without disabilities seeking comparable services at comparable times, this could violate § 35.210 or § 35.212.

Other commenters asked the Department to require public entities to offer and pay for accessible transportation when patients need to travel to other locations to use accessible MDE. The Department declines to adopt this requirement at this time because it has concluded that the requirements set forth elsewhere are sufficient to address the commenters' concerns. More specifically, a failure to provide accessible transportation when patients with disabilities need to travel to other locations to use accessible MDE, but nondisabled patients do not need to travel to other locations to receive care, or a requirement that patients incur additional costs to use accessible MDE, could violate § 35.210 or § 35.212 or more generalized nondiscrimination requirements in the existing title II regulation.<sup>[30]</sup>

Many commenters also raised concerns about the burdens that the approach to dispersion in § 35.211(b)(3) may impose on public entities. Some commenters stated that it might be difficult or impossible for some types of MDE to be moved, but commenters also noted that some types of MDE might be more portable or easily shared. A few commenters stated that there might not be sufficient space in some existing medical facilities for accessible MDE. Other commenters noted potential difficulties that may arise if public entities share accessible MDE between clinics or departments. These include delays and increased wait times; the need to identify, locate, move, and track accessible MDE; the need to transport patients; the need to recalibrate MDE after it is moved; unnecessary work for staff to locate or move accessible MDE if the patient who needed it has to reschedule; conflicts among multiple patients or departments who need the accessible MDE; last-minute needs for accessible MDE; and the need to determine how to provide care if shared accessible MDE is not available. While the Department acknowledges and appreciates the concerns raised by these commenters, it declines to change the dispersion requirement of paragraph (b)(3) because, for all of the reasons already stated, it finds that the current requirement is appropriate. Further, some of the challenges noted by these commenters might be mitigated by exercising the flexibility public entities retain to determine how they will meet the dispersion and nondiscrimination requirements in subpart I of this part, so long as they satisfy the minimum scoping requirements in § 35.211(b)(1) and (2).

Commenters also stated that, to share or move accessible MDE, patients would need to provide notice of their need for accessible MDE when booking an appointment and opined that booking systems and public information should clearly indicate where and when accessible MDE is available. At this time, the Department declines to adopt additional procedural requirements that certain information about the availability of accessible MDE be made available or that the need for accessible MDE be recorded as part of the booking process because public entities should have flexibility to meet the requirements of subpart I of this part in a manner that is appropriate to their resources and systems. However, it may be helpful or necessary for public entities to request information about patients' needs and make information about accessible MDE available to patients and staff where feasible. Doing so is likely to better position public entities to provide care in a nondiscriminatory manner, while enabling patients with disabilities to make informed decisions about their care. Providing information to staff about the availability of

<sup>[30]</sup> See, e.g., §§ 35.130(b)(1)(ii) and (f) and 35.150(a).

accessible MDE may also enable public entities to meet their other obligations under subpart I of this part, including the obligation in § 35.213 to ensure that their staff are able to carry out the program accessibility obligation set forth in § 35.212.

The Department recognizes there may be situations in which a public entity's facility or program shares one piece of a particular type of accessible MDE among all departments, clinics, or specialties. In a small facility or program with a limited number of departments, clinics, or specialties in the same building, that situation may provide equal access for all patients with disabilities who need accessible MDE. However, depending on the circumstances, it may be necessary or advisable to have at least one unit of accessible MDE in each department, clinic, or specialty, so that patients with disabilities do not need to traverse between departments, clinics, or specialties for care. The Department recognizes the varying circumstances of different public entities and health care settings. Whether a public entity can share accessible MDE between departments, clinics, or specialties and still carry out its obligations under subpart I of this part will depend on the circumstances.

Public entities must ensure that the dispersion of their accessible MDE does not discriminate against people with disabilities. If a public entity requires a patient with a disability who needs accessible MDE to use the MDE of another department, clinic, or specialty, or to use MDE in a different location, the public entity must ensure that the MDE and the service, program, or activity in its entirety are readily accessible to and usable by the patient, as required by §§ 35.210 and 35.212. Factors to consider in determining whether this standard has been met may include, among other things, whether the MDE is readily available and not a significant distance from where the patient is seeking care; whether changing locations during the patient visit significantly increases wait times; whether the patient is required to be undressed or partially dressed to use the MDE (if, for example, the patient has to go to a different part of the same building to use the accessible MDE); and whether the public entity provides assistance in moving between locations.

A public entity may be able to take other measures to ensure that its MDE and its services, programs, and activities in their entirety are readily accessible to and usable by patients with disabilities. For example, it could offer home visits that provide equal access to care or accessible transportation to patients with disabilities at no cost to them within a reasonable timeframe.

## Section 35.211(c) Requirements for Examination Tables and Weight Scales

Section 35.211(c) sets forth specific requirements for examination tables and weight scales. Paragraph (c)(1) requires public entities that use at least one examination table in their service, program, or activity to purchase, lease, or otherwise acquire, within two years after the publication of this part in final form, at least one examination table that meets the requirements of the MDE Standards, unless the entity already has one. Similarly, paragraph (c)(2) requires public entities that use at least one weight scale in their service, program, or activity, to purchase, lease, or otherwise acquire, within two years after the publication of this part in final form, at least one weight scale that meets the requirements of the MDE Standards, unless the entity already has one. This requirement is subject to the other requirements and limitations set forth in § 35.211. Thus, § 35.211(c) does not require a public entity to acquire an accessible examination table and an accessible weight scale if doing so would result in a fundamental alteration in the nature of the service, program, or activity or in undue financial and administrative burdens, as explained in § 35.211(e) and (f). In addition, public entities may use designs, products, or technologies as alternatives to those prescribed by the MDE Standards if the criteria set forth in § 35.211(d) are satisfied.

The Department received many comments in support of the requirements set forth in § 35.211(c), including comments from public entities and individuals with disabilities. Many commenters provided firsthand accounts of being unable to receive health care or receiving substandard care because of a lack of accessible examination tables or weight scales. Commenters also described receiving incomplete physical examinations because they could not transfer to an examination table, or forgoing routine examinations, such as abdominal palpations and breast examinations, due to a lack of accessible examination tables. Some noted that many medicines, including chemotherapy and anesthesia, are dosed based on weight, yet a lack of accessible weight scales makes it impossible for many people with disabilities to be accurately weighed. Similarly, disability advocacy groups shared representative accounts of harms that people with disabilities have experienced due to the inaccessibility of examination tables and weight scales.

Some commenters expressed concern that the requirements set forth in § 35.211(c) are insufficient. A few commenters urged the Department to require public entities to obtain more than one examination table or weight scale, particularly in facilities that focus on conditions that affect mobility. Other commenters asked the Department to require one examination table and weight scale per department, clinic, or specialty. The Department clarifies that the requirements in § 35.211(c) must be viewed in conjunction with the other requirements of subpart I of this part. For example, although § 35.211(c) requires public entities to obtain at least one accessible examination table and at least one accessible weight scale within two years, public entities may be required to obtain more than one examination table or weight scale based on the scoping requirements set forth in § 35.211(b). In addition, public entities are subject to the nondiscrimination and program access obligations in §§ 35.210 and 35.212, and the acquisition of multiple accessible examination tables or weight scales may be the most effective way to satisfy those obligations.

The Department requested public comment on the potential impact of the requirements in § 35.211(c) on people with disabilities and public entities. Several disability advocacy groups wrote that there are accessible weight scales on the market at varying costs, and that covered entities can also purchase or lease refurbished weight scales. The National Council on Disability commented that the economic impact on public entities will be modest and will be offset by the positive economic impact of more people being able to access preventative care. One commenter who uses a wheelchair noted that frequent delays during medical appointments due to a shortage of accessible examination tables and weight scales cost her money by preventing her from working.

Offering a different perspective, a few commenters expressed concern that it will be too expensive or logistically burdensome for providers to acquire the accessible MDE that § 35.211(c) requires. Some commenters suggested that the Department help providers pay for accessible MDE, including accessible examination tables and weight scales.

While the Department acknowledges the concerns of health care providers that will be required to carry out the obligations set forth in § 35.211(c), giving providers two years to meet the requirement for examination tables and weight scales, in particular, will improve access to basic diagnostic services for individuals with disabilities, while permitting providers to plan for the costs. Many of the comments that the Department received that describe the experiences of people with disabilities demonstrate the need for this requirement and the harm that a lack of accessible examination tables and weight scales can cause.

Regarding commenters' concerns about the cost of compliance, the Department does not currently operate a grant program to assist public entities in complying with the ADA. However, the Department notes that, pursuant to § 35.211(e), public entities are not required to take any action that would result in a fundamental alteration in the nature of a service, program, or activity, or in undue financial and administrative burdens. Given the availability of these limitations, the Department believes it is appropriate to retain the requirements set forth in § 35.211(c).

Regarding whether two years is an appropriate amount of time for entities to comply with the requirements in § 35.211(c), commenters had diverse perspectives. While many commenters agreed with the Department's choice of two years, some, including individuals with disabilities, the National Council on Disability, and disability advocacy groups, stated that two years is too long. Others stated that two years is not long enough for public entities to comply with this requirement, particularly if entities have limited resources or if equipment is not readily available. Some commenters suggested a phased implementation approach.

Given the health disparities and barriers to care facing individuals with disabilities,<sup>[31]</sup> and the importance of examination tables and weight scales for the provision of basic health care services, the Department does not believe an extension of the two-year requirement or a phased implementation period for particular types of public entities is warranted. The fundamental alteration and undue burdens provisions account for the difficulty that some entities might have complying with the requirements of subpart I of this part.

The Department also does not believe a period shorter than two years for compliance with § 35.211(c) is warranted. Although the Department recognizes that individuals with disabilities face urgent health care needs, the Department must also consider the ability of entities to budget for and obtain accessible examination tables and weight scales under a feasible timeframe. Given all of these factors, the Department finds it appropriate to impose a two-year timeline for complying with the requirements for examination tables and weight scales in § 35.211(c).

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[31] See C. Brooke Steele et al., *Prevalence of Cancer Screening Among Adults With Disabilities, United States, 2013*, 14 Preventing Chronic Disease (Jan. 2017), [https://www.cdc.gov/pcd/issues/2017/16\\_0312.htm](https://www.cdc.gov/pcd/issues/2017/16_0312.htm) [<https://perma.cc/T36Y-NCJM>] (finding disparate access to cancer screenings); Gloria Krahn, *Persons with Disabilities as an Unrecognized Health Disparity Population*, 105 Amer. J. Pub. Health 198 (Apr. 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4355692/> [<https://perma.cc/J8E4-J63T>] (finding higher prevalence of obesity and cardiovascular diseases); see also Michael Karpman et al., *QuickTake: Even with Coverage, Many Adults Have Problems Getting Health Care, with Problems Most Prevalent Among Adults with Disabilities*, Urban Inst. Health Pol'y Ctr. (Sept. 2015), <https://apps.urban.org/features/hrms/quicktakes/Many-Adults-Have-Problems-Getting-Health-Care.html> [<https://perma.cc/V6GB-AEPH>]; Carrie Henning-Smith et al., *Delayed and Unmet Need for Medical Care Among Publicly Insured Adults with Disabilities*, 51 Med. Care 1015 (Nov. 2013), <https://pubmed.ncbi.nlm.nih.gov/24113815/> [<https://perma.cc/KSY2-DGEV>]; Amanda Reichard et al., *Prevalence and Reasons for Delaying and Foregoing Necessary Care by the Presence and Type of Disability Among Working-Age Adults*, 10 Disability & Health J. 39 (Jan. 2017), <https://pubmed.ncbi.nlm.nih.gov/27771217/> [<https://perma.cc/V7D7-LCQK>]; Michelle Stransky et al., *Provider Continuity and Reasons for Not Having a Provider Among Persons With and Without Disabilities*, 12 Disability & Health J. 131 (Jan. 2019), <https://pubmed.ncbi.nlm.nih.gov/30244847/> [<https://perma.cc/2LSR-PEGJ>]; Sarah Bauer et al., *Disability and Physical and Communication-Related Barriers to Health Care Related Services Among Florida Residents: A Brief Report*, 9 Disability & Health J. 552 (July 2016), <https://pubmed.ncbi.nlm.nih.gov/27101882/> [<https://perma.cc/YH6F-22UW>] (finding barriers to access to care).

The Department notes, however, that even before the two-year requirement goes into effect, public entities are required to make their services, programs, and activities, including those that use MDE, accessible to people with disabilities. Even before the two-year deadline, if an entity denies a physical examination or fails to take an accurate weight because of a lack of an accessible examination table or weight scale, that may implicate the nondiscrimination obligation set forth in § 35.210 and the program access obligation set forth in § 35.212, as well as the obligations set forth in the existing title II regulation.

Some commenters, including a State entity, the National Council on Disability, and multiple disability advocacy groups, expressed concern that, other than examination tables and weight scales, public entities are not required to obtain additional types of MDE within a specified period of time. The Department imposed a two-year requirement for examination tables and weight scales because those two types of equipment are very common among primary care providers, important for a range of basic diagnostic health services, and relatively attainable compared to more expensive accessible imaging equipment.<sup>[32]</sup> Many people with disabilities are unable to receive even the most basic health care services because of inaccessible examination tables and weight scales. In view of demands on provider entities, particularly small practices and rural facilities, the Department will not require public entities to obtain accessible MDE other than examination tables and weight scales within two years. Public entities will, however, be required to ensure that other types of MDE are accessible when they are acquired in accordance with § 35.211(a), and they will be required to comply with §§ 35.210 and 35.212. And as discussed elsewhere in this appendix, the most effective way to carry out the requirements set forth in §§ 35.210 and 35.212 may be to acquire multiple types of accessible MDE, not only examination tables and weight scales.

## Section 35.211(d) Equivalent Facilitation

Paragraph (d) of § 35.211 specifies that a public entity may use designs, products, or technologies as alternatives to those prescribed by the MDE Standards, for example, to incorporate innovations in accessibility. However, this provision applies only where the use of the alternative designs, products, or technologies results in substantially equivalent or greater accessibility and usability of the health care service, program, or activity than the MDE Standards require. It does not permit a public entity to use an innovation that reduces access below what the MDE Standards would require. The responsibility for demonstrating equivalent facilitation rests with the public entity.

Several commenters wrote in support of the equivalent facilitation provision in § 35.211(d). A couple of commenters suggested that the Department clarify that use of equivalent facilitation must not result in improved access to one group of people with disabilities at the expense of reduced access for others. The Department agrees

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<sup>[32]</sup> See Access Board, *Access Board Review of MDE Low Height and MSRP* (May 23, 2023), <https://www.regulations.gov/document/ATBCB-2023-0001-0002> [<https://perma.cc/WU3U-DP65>] (listing available examination table models that meet the height requirements of the MDE Standards and their retail prices). On the affordability of accessible examination tables and weight scales compared to imaging equipment, see 82 FR 2829 (stating that commenters were concerned about immediate compliance with the MDE Standards for "more expensive imaging equipment" compared to other accessible MDE). See also Block Imaging, 2024 *Mammography Price Guide*, <https://www.blockimaging.com/bid/95356/digital-mammography-equipment-price-cost-info> [<https://perma.cc/2STC-34VW>].

that this provision does not apply if the use of an alternative design, product, or technology would make the health care service, program, or activity less accessible or usable for individuals with disabilities (or any group of individuals with disabilities) than the MDE Standards require.

The same commenters also recommended that the Department require entities to individually assess the preferences and needs of people with disabilities and receive informed consent before using an alternative option. The Department declines to require entities to individually assess the preferences and needs of people with disabilities and receive informed consent before using alternative designs, products, or technologies. This provision is modeled on existing language in the ADA Standards.<sup>[33]</sup> Adopting the approach that commenters proposed would create inconsistency between subpart I of this part and other portions of the Department's title II regulation,<sup>[34]</sup> which does not include the requirements for equivalent facilitation that commenters suggested. Further, requiring entities to engage in that sort of assessment with current or prospective patients could create an unworkable framework for public entities that had already obtained products that afforded equivalent or greater accessibility than the MDE Standards. However, nothing in this part requires patients to receive diagnostic health care services that they would prefer not to receive.

## Section 35.211(e) Fundamental Alteration and Undue Burdens

Paragraph (e) of § 35.211 addresses the fundamental alteration and undue financial and administrative burdens limitations. While subpart I of this part generally requires public entities to adhere to the MDE Standards when newly purchasing, leasing, or otherwise acquiring MDE, it does not require public entities to take steps that would result in a fundamental alteration in the nature of their services, programs, or activities or in undue financial and administrative burdens. These limitations mirror the existing title II regulation at § 35.150(a)(3). If a particular action would result in a fundamental alteration or undue burdens, the public entity is obligated to take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services the public entity provides.

Many commenters wrote in support of the fundamental alteration and undue burdens limitations, with some noting that the approach strikes a thoughtful balance that will promote equal access to MDE for people with disabilities while mitigating the challenges and costs of implementation for public entities. While some commenters objected to the cost of complying with subpart I of this part, others said cost and acquisition difficulties should not be an excuse for noncompliance. A few commenters wrote that it is unlikely that an entity will reasonably be able to rely on these limitations at all. Some commenters wrote that people with disabilities historically have been forced to carry the burden, and the provision should consider the burden on people with disabilities in terms of factors like wait times, extra costs, and the availability of accessible providers. Some commenters asked the Department to clarify or define certain terms, such as "undue burden" or "fundamental alteration." One comment suggested a particular method for making an undue burden calculation.

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<sup>[34]</sup> See, e.g., § 35.151(c) (allowing or requiring public entities to comply with the 1991 ADA Standards or 2010 ADA Standards).

<sup>[33]</sup> 28 CFR part 36, appendix D, at 1000 (2022) (1991 ADA Standards); 36 CFR part 1191, appendix B, at 329 (2022) (2010 ADA Standards).

A few commenters recommended that the Department establish exceptions according to a different framework. One suggested that the Department exempt whole categories of entities, including small practices, new practices, and practices in areas with a health professional shortage. Others suggested that the Department extend the compliance timeframes for certain categories of entities, including small, rural, and "safety-net" entities.

The Department acknowledges commenters' concerns that the fundamental alteration and undue burdens limitations will undermine access for people with disabilities. However, these limitations fall within the well-established title II framework,<sup>[35]</sup> and it is important for these limitations on obligations to remain consistent with part 35 as a whole. These limitations also require a more individualized inquiry than the categorical exceptions that some commenters suggested and will therefore strike a better balance between the accessibility needs of individuals with disabilities and the potential difficulties of compliance in particular circumstances. As noted in the preceding paragraphs, if an action would result in a fundamental alteration or undue burdens, the public entity must still take any other action that would ensure that individuals with disabilities receive the benefits or services the public entity provides.

Because fundamental alteration and undue burdens are longstanding limitations under the ADA,<sup>[36]</sup> members of the public and public entities should already be familiar with these limitations in other contexts. The Department has provided guidance that addresses the fundamental alteration and undue burdens limitations, and will consider providing more in the future.<sup>[37]</sup> The Department's existing guidance documents provide details on fundamental alteration and undue burdens determinations, including language explaining that such determinations should consider all resources available for use in the funding and operation of the service, program, or activity.<sup>[38]</sup> In the Department's view, this guidance will help public entities use the fundamental alteration and undue burdens limitations appropriately.

## Section 35.211(f) Diagnostically Required Structural or Operational Characteristics

Paragraph (f) of § 35.211 incorporates what M201.2 of the Access Board's MDE Standards refers to as a General Exception.<sup>[39]</sup> The paragraph states that, where a public entity can demonstrate that compliance with the MDE Standards would alter diagnostically required structural or operational characteristics of the equipment, preventing the use of the equipment for its intended diagnostic purpose, compliance with the Standards would result in a fundamental alteration and therefore is not required.

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<sup>[35]</sup> See appendix B to this part.

<sup>[38]</sup> *Id.*

<sup>[37]</sup> See, e.g., U.S. Dep't of Just., *ADA Update: A Primer for State and Local Governments*, ADA.gov (Feb. 28, 2020), <https://www.ada.gov/resources/title-ii-primer/> [<https://perma.cc/ZV66-EFWU>].

<sup>[36]</sup> See *id.* §§ 35.130(b)(7), 35.150(a)(3), and 35.164.

<sup>[39]</sup> 36 CFR part 1195, appendix, section M201.2 (revised as of July 1, 2017).

In the NPRM, the Department sought comment on whether the proposed exception in § 35.211(f) is needed. Multiple commenters supported the Department's approach, describing it as "thoughtful" and "balance[d]." Other commenters disagreed with this exception and recommended that the Department remove or amend it, stating that the exception is unnecessary, that it will be an overused loophole, or that it will stifle innovation.

While the Department appreciates commenters' opinions and concerns and recognizes the importance of providing accessible MDE to people with disabilities, the Department continues to believe that this exception is sometimes needed to preserve the functionality of MDE. For instance, as noted in the NPRM, the Department is aware that certain positron emission tomography ("PET") machines cannot meet the MDE Standards' technical requirements for accessibility and still serve their diagnostic function. Commenters did not provide information that called this into question. Rather, the Department received numerous comments, including several comments regarding radiological diagnostic services, stating that this exception is essential. These commenters expressed concern that the MDE Standards are incompatible with the safe design and use of some types of diagnostic imaging equipment. With respect to MRI machines in particular, a disability rights organization observed that structural attributes may prevent certain equipment from being made accessible, and noted the importance of providing alternatives to ensure accessibility for individuals who use metal wheelchairs or assistive equipment.

In light of these factors, the Department will retain the exception in § 35.211(f). The Department expects, however, that this exception will apply only in rare cases. In such circumstances, the public entity must still take any other action that would not result in a fundamental alteration or undue burdens but would nevertheless ensure that individuals with disabilities receive the services, programs, or activities the public entity provides. For example, a PET machine that could not meet the MDE Standards and still serve its diagnostic function would not be required to meet the MDE Standards as a whole, but the public entity would still be required to meet all other applicable provisions of the MDE Standards, and to take any other action that would ensure that individuals with disabilities receive the public entity's benefits or services without fundamentally altering the nature of the service, program, or activity, or imposing undue financial and administrative burdens. Such actions could include, for example, assisting patients with transferring to the scan table so that they can receive a PET scan.

With respect to a commenter's concern that this exception will stifle innovation, the Department appreciates both the value of innovation and the importance of ensuring that MDE used by individuals with disabilities can be used safely and in accordance with its intended diagnostic purpose, given the constraints of existing technology. The Department believes § 35.211(f) strikes an appropriate balance between these interests. Further, the reason for allowing for equivalent facilitation in § 35.211(d) is to encourage flexibility and innovation by public entities while still ensuring equal or greater access to MDE.

In addition to commenters who recommended that the Department eliminate the exception in § 35.211(f), some commenters suggested changes to the regulatory text. One commenter suggested that the regulatory text should include language from the section-by-section analysis relating to the rare use of the provision and assistance transferring to a PET machine. The Department declines to incorporate these points into the regulatory text. Because the forgoing discussion reflects the Department's expectation about the rare applicability of this provision, and because the discussion about PET scans is one representative example, this discussion is more appropriately situated in this appendix than in the regulatory text.

A few commenters asked the Department to require that, where equipment's structural or operational characteristics implicate the fundamental alteration limitation, covered entities must consider all possibilities to ensure the dignity and independence of the person with a disability. The Department declines to amend the regulatory text to explicitly state that public entities must consider all possibilities to ensure the dignity and

independence of people with disabilities. While the Department encourages public entities to do so to the extent feasible, the Department believes that the obligations set forth in the regulatory text in §§ 35.210 and 35.212, when read together with the ADA and the general prohibition on discrimination in its implementing regulation, are sufficient to prevent discrimination without further changes to this section.<sup>[40]</sup>

## Section 35.212 Existing Medical Diagnostic Equipment

In addition to the requirements for newly purchased, leased, or otherwise acquired MDE, § 35.212 requires that public entities address access barriers resulting from a lack of accessible MDE in their existing inventory of equipment. Here subpart I of this part adopts an approach analogous to the concept of program accessibility in the existing regulation implementing title II of the ADA.<sup>[41]</sup> Under this approach, public entities may make their services, programs, and activities available to individuals with disabilities, without extensive retrofitting of their existing buildings and facilities that predate the regulation, by offering access to those programs through alternative methods. The Department adopts a similar approach with respect to MDE to provide flexibility to public entities, address financial concerns about acquiring new MDE, and at the same time ensure that individuals with disabilities will have access to public entities' health care services, programs, and activities.

Section 35.212 requires that each service, program, or activity of a public entity, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities. Section 35.212(a)(1) makes clear, however, that a public entity is not required to make each piece of its existing MDE accessible. Like § 35.211(e), § 35.212(a)(2) incorporates the concepts of fundamental alteration and undue financial and administrative burdens. As addressed in more detail in the discussion of these limitations in the section-by-section analysis of § 35.211(e), the fundamental alteration and undue burdens provisions do not excuse a public entity from addressing the accessibility of the program. If a particular action would result in a fundamental alteration or undue burdens, the public entity is still obligated to take any other action that would ensure that individuals with disabilities are able to receive the public entity's benefits and services. As with the fundamental alteration and undue burdens limitations, the discussion of the exception relating to diagnostically required structural or operational characteristics contained in the section-by-section analysis of § 35.211(f) applies equally to the Department's approach to this exception in § 35.212(a)(3).

The Department is also correcting a typographical error in § 35.212(a)(3). Section 35.212(a)(3) states that an entity meets its burden of proving that compliance with § 35.212(a) would result in a fundamental alteration under § 35.212(a)(2) if it demonstrates that compliance with § 35.212(a) would alter diagnostically required structural or operational characteristics of the equipment and prevent the use of the equipment for its intended diagnostic purpose. The NPRM mistakenly referred to § 35.211(a) and (c) rather than to § 35.212(a).

Section 35.212(b) describes various methods by which public entities can make their services, programs, and activities readily accessible to and usable by individuals with disabilities when the requirements set forth in § 35.211 have not been triggered by the new acquisition of MDE. Of course, the purchase, lease, or other acquisition

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<sup>[40]</sup> See, e.g., 42 U.S.C. 12101(a); § 35.130(b).

<sup>[41]</sup> See § 35.150.

of accessible MDE may often be the most effective way to achieve program accessibility. However, except as stated in § 35.211, a public entity is not required to purchase, lease, or otherwise acquire accessible MDE if other methods are effective in achieving compliance with subpart I of this part.

For instance, if doctors at a medical practice have staff privileges at a local hospital that has accessible MDE, the medical practice may be able to achieve program accessibility by ensuring that the doctors see a person with a disability who needs accessible MDE at the hospital, rather than at the local office, so long as the person with a disability is afforded an opportunity to participate in or benefit from the service, program, or activity equal to that afforded to others. Similarly, if a medical practice has offices in several different locations, and one of the locations has accessible MDE, the medical practice may be able to achieve program accessibility by serving the patient who needs accessible MDE at that location. However, such an arrangement would not provide an equal opportunity to participate in or benefit from the service, program, or activity if it was, for example, significantly less convenient for the patient or if the visit to a different location resulted in higher costs for the patient.

Similarly, if the scoping requirements set forth in § 35.211(b) require a public entity's medical practice to have three accessible examination tables and an accessible weight scale, but the practice's existing equipment includes only one accessible examination table and one accessible scale, then until the practice must comply with § 35.211, the practice can ensure that its services are readily accessible to and usable by people with disabilities by establishing operating procedures such that, when a patient with a mobility disability schedules an appointment, the accessible MDE can be reserved for the patient's visit. In some cases, a public entity may be able to make its services readily accessible to and usable by individuals with disabilities by using a patient lift or a trained lift team, especially in instances in which a patient cannot or chooses not to independently transfer to the MDE in question.<sup>[42]</sup>

If a public entity carries out its obligation under § 35.212(a) to make a service, program, or activity readily accessible to and usable by people with disabilities by purchasing, leasing, or otherwise acquiring accessible MDE, then that newly purchased, leased, or otherwise acquired MDE must comply with the requirements set forth in § 35.211.

Several commenters recommended that the Department include more specificity regarding the methods by which public entities must make their services, programs, and activities readily accessible to and usable by individuals with disabilities. For example, one commenter suggested that the Department establish a clear and defined test to assess compliance with the program access obligation. Another commenter suggested that the Department establish thresholds to determine whether public entities provide an equal opportunity to participate in or benefit from the service, program, or activity. Citing the Department's statement in the NPRM that allowing a patient to use accessible MDE at an alternative location would not give a patient with a disability an equal opportunity to participate in or benefit from the service, program, or activity if it was significantly less convenient or resulted in higher costs for the patient, the commenter suggested that the Department define how inconvenient an alternative location must be, either in terms of distance or in terms of travel time, in order to violate § 35.212(a).

The Department acknowledges these concerns and the commenters' desire for more clearly defined parameters, but notes that the concept of services, programs, and activities being readily accessible to and usable by individuals with disabilities is a longstanding requirement under title II of the ADA in other contexts.<sup>[43]</sup> Therefore, members of the public and State and local governments should already be familiar with this obligation. The Department has also

<sup>[42]</sup> See U.S. Dep't of Just., Civ. Rts. Div., *Access to Medical Care for Individuals with Mobility Disabilities* (June 26, 2020), <https://www.ada.gov/resources/medical-care-mobility/> [<https://perma.cc/UH8Y-NZWL>].

provided guidance that addresses this concept,<sup>[44]</sup> and will consider providing more in the future. The Department operates a toll-free ADA Information Line that the public can call for assistance understanding the requirements of the ADA. The question of whether a particular service, program, or activity, in its entirety, is readily accessible to and usable by individuals with disabilities will be an inherently fact-bound inquiry.

Some commenters recommended that the Department require public entities to engage in an interactive process with patients and consider patients' preferences and needs in determining how to carry out their program access obligations. An "interactive process" is a term of art that applies in the ADA title I context but not the ADA title II context, and the Department declines to require such a process in subpart I of this part.<sup>[45]</sup> However, it may often be helpful or necessary for public entities to consider patients' preferences and needs in order to ensure that the entity's services, programs, and activities, in their entirety, are readily accessible to and usable by individuals with disabilities. For example, using the scenario discussed in the preceding paragraphs, a medical practice that lacks accessible MDE at its primary location might be able to achieve program accessibility by serving a patient who needed accessible MDE at an alternative location. But the practice would first need to determine how difficult it would be for the patient to travel to the alternative location. As explained in the preceding paragraphs, if the alternative location was significantly less convenient or resulted in higher costs for the patient, it would not provide an equal opportunity to participate in or benefit from the service, program, or activity.

One commenter asked whether public entities can continue to use existing MDE that meets some but not all of the requirements set forth in the MDE Standards. The commenter asked whether, for example, an entity can use an adjustable height examination table that lowers to the minimum height but does not raise to the upper height set forth in the MDE Standards. As § 35.212(b) explains, § 35.212(a) does not require public entities to acquire MDE that meets all of the requirements set forth in the MDE Standards if other methods enable them to make their services, programs, and activities, in their entirety, readily accessible to and usable by individuals with disabilities. Using MDE that meets some but not all of the requirements set forth in the MDE Standards may, in some cases, be one way for public entities to carry out their program access obligation under § 35.212(a). In contrast, newly acquired MDE must meet all of the requirements set forth in the MDE Standards pursuant to § 35.211(a), absent an applicable limitation.

Finally, one commenter recommended that the Department add a requirement from the ADA title III regulations that "a public accommodation shall remove architectural barriers in existing facilities where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense."<sup>[46]</sup> The readily achievable barrier removal standard applies to architectural barriers, not barriers in equipment, and importing requirements from the ADA title III regulation into subpart I of this part could create confusion and inconsistency with the other obligations in subpart I and with the rest of the title II regulation. Additionally, MDE often cannot be retrofitted to be accessible with the same ease or cost ratio as many forms of readily achievable barrier removal, such as adding raised markings to elevator buttons or providing paper cups at an inaccessible water fountain. The Department therefore declines to import the readily achievable barrier removal standard into the final rule.

<sup>[44]</sup> See, e.g., U.S. Dep't of Just., Civ. Rts. Div., *ADA Update: A Primer for State and Local Governments* (Feb. 28, 2020), <https://www.ada.gov/resources/title-ii-primer/> [<https://perma.cc/ZV66-EFWU>]; U.S. Dep't of Just., *Title II Assistance Manual: Covering State and Local Government Programs and Services*, <https://archive.ada.gov/taman2.html> [<https://perma.cc/6QNC-3RRA>].

<sup>[45]</sup> See, e.g., §§ 35.150 and 35.151.

<sup>[46]</sup> See 29 CFR 1630.2(o)(3).

## Section 35.213 Qualified Staff

Section 35.213 requires public entities to ensure that their staff members are able to successfully operate accessible MDE, assist with transfers and positioning of individuals with disabilities, and carry out the program access obligation with respect to existing MDE. This will enable public entities to carry out their obligation to make the programs, services, and activities that they offer through or with the use of MDE readily accessible to and usable by individuals with disabilities. The Department believes that public entities must have, at all times when services are provided to the public, appropriate and knowledgeable personnel who can operate MDE in a manner that ensures services are available and timely provided. Often, the most effective way for public entities to ensure that their staff members are able to successfully operate accessible MDE is to provide staff training on the use of MDE, but the final rule does not mandate that approach.

The Department received comments on this issue from a range of stakeholders, including individuals with disabilities, disability advocacy organizations, and health care providers. Many commenters supported the Department's proposal. In response to the Department's request for comments on the effectiveness of programs used to ensure that staff are qualified, several disability advocacy organizations noted that even when a health care provider has accessible MDE, staff are sometimes unable to operate it. Many people with disabilities and disability advocacy organizations also described interactions with staff who were not able to provide assistance with transfers or did not provide program access in other ways. These accounts supported the need for § 35.213, which explicitly requires public entities to ensure that their staff members are able to successfully operate accessible MDE, assist with transfers, and ensure program access.

A disability advocacy organization proposed that the Department revise the text of § 35.213 to include personnel who are responsible for scheduling appointments and maintaining accessible MDE, and to require public entities to ensure that staff members are able to maintain accessible MDE and ensure scheduling times and reservations appropriate for patients with disabilities. The Department believes that the current language of the general nondiscrimination obligation set forth in § 35.210 and the program access obligation set forth in § 35.212, in conjunction with the other provisions in the title II regulation that require equal access and maintenance of accessible features,<sup>[47]</sup> is sufficient to address the issues raised by the commenter. The Department also notes that § 35.213 pertains to public entities' staff but is not limited to particular types of staff. As with the other topics for training discussed in the section-by-section analysis of § 35.213, public entities may find that providing their staff with the training this commenter described is often the most effective way to meet their obligations under subpart I of this part and other parts of the ADA. The lack of a specific requirement to provide training to these personnel regarding these issues would not excuse a related ADA violation.

Only one commenter opposed § 35.213. This commenter stated that requiring public entities to ensure that their staff members are able to assist with transfers would lead to discrimination against employees with disabilities who are not physically able to assist with transfers. The Department notes that subpart I of this part does not supersede or alter title I of the ADA or occupational safety standards, or redefine the essential functions of any particular employee's job.<sup>[48]</sup> Qualified employees with disabilities remain entitled to reasonable accommodations

<sup>[46]</sup> 28 CFR 36.304(a).

<sup>[47]</sup> See, e.g., *id.* §§ 35.130 and 35.133.

as specified in existing law.<sup>[49]</sup> However, an individual employee's need for accommodations does not diminish the rights of other individuals with disabilities to have equal access to the services, programs, and activities provided by a public entity.

Many commenters encouraged the Department to establish more explicit and specific requirements for training. Commenters provided a variety of suggestions for what these requirements should be, including certification; training by the manufacturers of accessible MDE; periodic "refresher" training; and training on additional topics, such as the maintenance of accessible MDE, appointment scheduling and booking accessible MDE, attitudinal barriers, implicit bias, ableism, disability culture, disability history, providing care to individuals with disabilities, transfer support and practice, the use of lifts, plain language, effective communication, and reasonable modifications. One commenter suggested that the Department should withhold Federal funding if certain training is not conducted. Many commenters stated that people with disabilities should be involved in training so that public entities are able to draw from individuals' lived experiences.

In response to the Department's request for comments on the costs of programs for ensuring qualified staff, a few commenters stated that the cost of training would be minimal, especially in comparison to the cost of an injury to individuals with disabilities or personnel. These commenters stated that proper training reduces the number of injuries to individuals with disabilities and staff, ultimately reducing costs for covered entities.

After considering all of these comments, the Department declines to impose more specific requirements in § 35.213. Training, including training on the topics commenters suggested, will often be the most effective way to for public entities to ensure compliance with the entity's obligations under subpart I of this part. Training developed in consultation with, or provided by, individuals with disabilities may be particularly effective. And the Department appreciates commenters' views that training may ultimately reduce costs. However, the Department believes it is important to provide public entities with flexibility to determine how they will comply with the qualified staff requirement. Appropriate methods for meeting this requirement may differ for small health care providers as opposed to large hospital systems, for example. The Department has therefore decided not to mandate one specific process or curriculum that all public entities must follow to comply with § 35.213.

Several commenters suggested steps the Department could take to assist covered entities in complying with this requirement and the other requirements set forth in subpart I of this part. Suggestions included providing additional guidance, technical assistance, training, and financial resources. Some commenters also suggested that the Department collaborate with manufacturers to provide instructions on how to use accessible MDE or encourage covered entities to request instructions during procurement. The Department notes that it has already provided some technical assistance.<sup>[50]</sup> If public entities would find it helpful to seek additional information from MDE manufacturers or vendors, the Department encourages entities to do so. As noted in the discussion of § 35.211(c), the Department does not currently operate a grant program to assist public entities in complying with the ADA. The Department will, however, continue to consider what additional guidance, technical assistance, or training it can provide that will assist regulated entities in complying with their obligations under subpart I of this part.

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[49] 42 U.S.C. 12112(b)(5); 29 CFR 1630.9.

[48] See 42 U.S.C. 12111-12117.

## Public Comments on Other Issues in Response to NPRM

The Department received comments on a variety of other issues in response to the NPRM. Several commenters recommended that the Department prescribe specific steps that all entities must take in order to carry out the primary requirements in subpart I of this part, such as employing scheduling and reservation systems; maintaining and publishing lists of accessible inventory, including the location of such equipment; reimbursing patients for transportation costs to accessible facilities; using certain staff-to-patient ratios; having staff take notes on each patient's needs and the patient's level of understanding; providing communication access in American Sign Language and Braille; using patient lifts or transfer teams; and offering scales and health monitoring tools for home use to patients with transportation difficulties. Another commenter suggested that entities subcontract with disability groups to test MDE that the entities have purchased. Some commenters also suggested that the Department issue guidance on various topics.

While the Department appreciates commenters' thoughtful suggestions, the Department declines to prescribe that public entities must take these specific steps in order to carry out the requirements in subpart I of this part. The Department intends to instead give public entities and members of the public clarity about the requirements in subpart I of this part, while also giving public entities flexibility in determining how best to carry out those requirements based on their individual circumstances. Public entities may find that many of the approaches recommended in the comments summarized in the preceding paragraph will enable them to carry out the requirements in subpart I of this part. The Department will also consider providing additional guidance to public entities about how to comply with subpart I of this part.

Commenters also expressed concern that people with disabilities are not involved in decisions associated with their care, in general. One commenter suggested that all policies about people with disabilities should be formed in consultation with an advisory council of people with a range of disabilities. The Department agrees that it is important to involve people with disabilities in decisions involving the creation and implementation of disability-related rules and policies. Indeed, the technical standards that the Department is adopting were created by the Access Board, a coordinating body that includes 13 members of the public, most of whom are required to have a disability in order to be appointed to the Access Board.<sup>[51]</sup> The Department has also carefully considered comments on the NPRM from many members of the public who self-identified as having a disability. In addition, individuals with disabilities can file a complaint with the Department or file a private lawsuit if a public entity fails to carry out its title II obligations. Given the existing mechanisms to solicit feedback and receive complaints about implementation from individuals with disabilities, the Department declines to create an advisory council in connection with this part.

The Department also received a comment suggesting that it regularly review and update accessibility standards to reflect technological advancements and the evolving needs of individuals with disabilities. Executive Order 13563 already requires the Department to review its regulations periodically to determine whether they should be modified, streamlined, expanded, or repealed.<sup>[52]</sup> Further, section 510 of the Rehabilitation Act requires the Access Board, in consultation with the Food and Drug Administration, to periodically review and, as appropriate, amend the MDE standards.<sup>[53]</sup> Therefore, a separate mechanism for reviewing the effectiveness of this part is not necessary.

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<sup>[50]</sup> See, e.g., U.S. Dep't of Just., Civ. Rts. Div., *Access to Medical Care for Individuals with Mobility Disabilities* (June 26, 2020), <https://www.ada.gov/resources/medical-care-mobility/> [<https://perma.cc/UH8Y-NZWL>].

<sup>[51]</sup> U.S. Access Board, *About the U.S. Access Board*, <https://www.access-board.gov/about/> [<https://perma.cc/L9N7-56YV>].

Finally, the Department received a few comments asking that it make the MDE Standards enforceable against title III entities. As noted in section II.A of the preamble to the final rule ("Statutory and Rulemaking Overview"), the Department will continue to consider issues concerning MDE under title III. The Department will also continue to consider further rulemaking on this topic. However, title III entities are not the subjects of this rulemaking.

[AG Order No. 5982-2024, 89 FR 65189, Aug. 9, 2024]

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[53] 29 U.S.C. 794f(c).

[52] E.O. 13563, sec. 6, 3 CFR, 2011 Comp., p. 215.